Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1798

BLUE DIAMOND COAL COMPANY, - Petitioner,

versus

JENNIFER BOGGS, CAROL COMBS, GERALDINE COOTS, VERA GALLOWAY, LIBBY GIBBS, MADONNA GRIFFITH, DIANE McKNIGHT, GERALDINE McKNIGHT, PHYLLIS PEAVEY, VICKIE SCOTT, CELINDA SPARKMAN, ETHEL STURGILL, DEBBIE TURNER, REDA TURNER, and CHARLOTTE WIDNER, Administratrices of their Decedents and Individually, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2– 3

Statutes, Rules and Regulations Involved 3– 7

Statement of the Case 8–16

Reasons for Granting the Writ 16–49

I. In Ignoring Kentucky's Certification Procedure and Refusing to Certify to the Supreme Court of Kentucky the Controlling Public Policy Issues Involved as to the Proper Interpretation of Kentucky's Workmen's Compensation Act, the Court of Appeals Adopted an Approach Patently Contrary to the Teachings of This Court 16–35

II. The Court of Appeals' Disregard of Kentucky's Certification Procedure Directly Conflicts With the Established Practice Adopted by Other Circuits Under Similar Circumstances 35–41

III. The Court of Appeals Erroneously Determined an Important Question of State Law Under Kentucky's Workmen's Compensation Act in Violation of the Duty Imposed Upon It by *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938) 41–49

Conclusion 49

Appendix 1a–31a

Opinion of the United States Court of Appeals.. 1a–17a
Judgment of the United States Court of Appeals. 18a
Order of the United States Court of Appeals Denying Petition for Rehearing..... 19a
Memorandum Opinion of United States District Court for the Eastern District of Kentucky..20a–29a
Order of the United States District Court for the Eastern District of Kentucky.....30a–31a

TABLE OF AUTHORITIES

Cases: PAGE

Adams v. *Ford Motor Co.*, 573 F. 2d 1182 (10th Cir. 1978) 43

Adamson v. *Okland Construction Co.*, 508 P. 2d 805 (Utah 1973) 43

Aetna Casualty & Surety Co. v. *Hertz Corp.*, 573 F. 2d 306 (5th Cir. 1978) 37

Aldrich v. *Aldrich*, 375 U. S. 75, 249 (1963), *on certification*, 163 So. 2d 276 (Fla. 1964), *on receipt of answers following certification*, 378 U. S. 540 (1964) 30

Allen v. *Estate of Carman*, 446 F. 2d 1276 (5th Cir. 1971), *on certification*, 281 So. 2d 317 (Fla. 1973), *on receipt of answers following certification*, 486 F. 2d 490 (5th Cir. 1973) 38

American Timber and Trading Co. v. *First National Bank of Oregon*, 511 F. 2d 980 (9th Cir. 1973), *cert. denied*, 421 U. S. 921 (1975) 28

Arnold v. *Shell Oil Co.*, 419 F. 2d 43 (5th Cir. 1969) 43

Bellotte v. *Zayre Corp.*, 531 F. 2d 1100 (1st Cir. 1976), *on certification*, 352 A. 2d 723 (N.H. 1976) 39

Bellotti v. *Baird*, 428 U. S. 132 (1976) 31

Blanchard v. *Engine & Gas Compressor Services, Inc.*, 575 F. 2d 1140 (5th Cir. 1978), *certification order*, 590 F. 2d 594 (5th Cir. 1979) 38

Brennan v. *University of Kansas*, 451 F. 2d 1287 (10th Cir. 1971) 28

Bryant v. *Old Republic Insurance Co.*, 431 F. 2d 1385 (6th Cir. 1970) 20

Castlewood International Corp. v. *Simon*, 564 F. 2d 695 (5th Cir. 1977) 37

Cincinnati Insurance Co. v. *City of Talladega, Alabama*, 529 F. 2d 718 (5th Cir. 1976), *on certification*, 342 So. 2d 331 (Ala. 1977), *on receipt of answers following certification*, 552 F. 2d 128 (5th Cir. 1977) 37

Cases (Cont'd): PAGE

Clay v. *Sun Insurance Office*, 363 U. S. 207 (1960), *on certification*, 133 So. 2d 735 (Fla. 1961) 29, 30

Coco v. *Winston Industries*, 330 So. 2d 649 (La. App. 1975), *judgment set aside on other grounds*, 341 So. 2d 332 (La. 1976) 20, 44

Cole v. *Chevron Chemical Company—Oronite Division*, 477 F. 2d 361 (5th Cir. 1973), *cert. denied*, 414 U. S. 858, 978 (1973) 43

Commissioner v. *Estate of Bosch*, 387 U. S. 456 (1967) 24

D'Ambra v. *United States*, 518 F. 2d 275 (1st Cir. 1975), *on certification*, 338 A. 2d 524 (R.I. 1975) 39

Dresner v. *City of Tallahassee*, 375 U. S. 136 (1963), *on certification*, 164 So. 2d 208 (Fla. 1964) 30

Eagle Star Insurance Co. v. *Deal*, 474 F. 2d 1216 (8th Cir. 1973) 47

Elkhorn-Hazard Coal Land Corp. v. *Taylor*, 539 S. W. 2d 101 (Ky. 1976) 21–22, 46

Elkins v. *Moreno*, 435 U. S. 647 (1978) 32

Erie R. Co. v. *Tompkins*, 304 U. S. 64 (1938) 2, 24, 41

Fidelity Union Trust Co. v. *Field*, 311 U. S. 169 (1940) 24

Filley v. *Kickoff Publishing Co.*, 454 F. 2d 1288 (6th Cir. 1972) 28

Gabhart v. *Gabhart*, 545 F. 2d 877 (7th Cir. 1977), *on certification*, 370 N. E. 2d 345 (Ind. 1977) ...39, 40

Green v. *American Tobacco Co.*, 304 F. 2d 70 (5th Cir. 1962), *on certification*, 154 So. 2d 169 (Fla. 1963), *on receipt of answers following certification*, 325 F. 2d 673 (5th Cir. 1963), *cert. denied*, 377 U. S. 943 (1964), *on appeal after retrial*, 391 F. 2d 97 (5th Cir. 1968), *rev'd on rehearing en banc*, 409 F. 2d 1166 (5th Cir. 1969) 36

Helvering v. *Stuart*, 317 U. S. 154 (1942), *as modified*, 317 U. S. 602 (1942) 41

Hiram Ricker & Sons v. *Students International Meditation Society*, 501 F. 2d 550 (1st Cir. 1974), *on certification*, 342 A. 2d 262 (Me. 1975) 39

Cases (Cont'd):

PAGE

Hopkins v. *Lockheed Aircraft Corp.*, 358 F. 2d 347 (5th Cir. 1966), *on certification*, 201 So. 2d 743 (Fla. 1967), *on receipt of answers following certification*, 394 F. 2d 656 (5th Cir. 1968) 37

In Re Glassman, 262 F. 2d 857 (6th Cir. 1958) 28

In Re McClintock, 558 F. 2d 732 (5th Cir. 1977), *on certification*, 241 S. E. 2d 831 (Ga. 1978), *on receipt of answers following certification*, 571 F. 2d 317 (5th Cir. 1978) 37

Jackson v. *Southern Pacific Co.*, 285 F. Supp. 388 (D.C. Nev. 1968) 43

Kaiser Steel Corp. v. *W. S. Ranch Co.*, 391 U. S. 593 (1968), *rev'g*, 388 F. 2d 257 (10th Cir. 1967) 33

Kaiser Steel Corp. v. *W. S. Ranch Co.*, 467 P. 2d 986 (N.M. 1970) 33

King v. *Shelby Rural Electric Cooperative Corp.*, 502 S. W. 2d 659 (Ky. 1973), *cert. denied*, 417 U. S. 932 (1974) 25, 48–49

Krutsinger v. *Mead Foods, Inc.*, 546 F. 2d 328 (10th Cir. 1976), *on certification*, 560 P. 2d 195 (Okla. 1977) 40

Lehman Brothers v. *Schein*, 416 U. S. 386 (1974), *on certification*, 313 So. 2d 739 (Fla. 1975), *on receipt of answers following certification*, 519 F. 2d 453 (2nd Cir. 1975) 31

Liles v. *Riblet Products of Louisiana, Inc.*, 363 F. Supp. 358 (W.D. La. 1973), *aff'd*, 509 F. 2d 804 (5th Cir. 1975) 44

Louisiana Power & Light Co. v. *City of Thibodaux*, 360 U. S. 25 (1959) 32–33

MacGregor v. *State Mutual Co.*, 315 U. S. 280 (1942) 41

Mahan v. *Litton*, 321 S. W. 2d 243 (Ky. 1959)..25, 44–45, 46, 49

Martin v. *University of Louisville*, 541 F. 2d 1171 (6th Cir. 1976) 28

Martinez v. *Rodriquez*, 394 F. 2d 156 (5th Cir. 1968), *on certification*, 215 So. 2d 305 (Fla. 1968), *on receipt of answers following certification*, 410 F. 2d 729 (5th Cir. 1969) 37

Cases (Cont'd):

PAGE

Matters of Cedars of Lebanon Hospital Corp., Inc., 546 F. 2d 63 (5th Cir. 1977), *on certification*, 355 So. 2d 1202 (Fla. 1978), *on receipt of answers following certification*, 574 F. 2d 1323 (5th Cir. 1978) 37

Nardone v. *Reynolds*, 508 F. 2d 660 (5th Cir. 1975), *on certification*, 333 So. 2d 25 (Fla. 1976), *on receipt of answers following certification*, 538 F. 2d 1131 (5th Cir. 1976) 36

N.L.R.B. v. *Gass*, 377 F. 2d 438 (1st Cir. 1967) 48

N.L.R.B. v. *Patterson Menhaden Corp.*, 389 F. 2d 701 (5th Cir. 1968) 48

Poyner v. *Lear Siegler, Inc.*, 542 F. 2d 955 (6th Cir. 1976), *cert. denied*, 430 U. S. 969 (1977) 47

Reetz v. *Bozanich*, 397 U. S. 82 (1970) 33

Renfroe v. *Higgins Rack Coating & Manufacturing Co.*, 169 N. W. 2d 326 (Mich. App. 1969) 44

Rudd-Melikian v. *Merritt*, 282 F. 2d 924 (6th Cir. 1960) 28

Rutherford v. *Modern Transportation Co.*, 320 A. 2d 522 (N.J. Super. L. Div. 1974) 43

Seltzer v. *Isaacson*, 371 A. 2d 304 (N.J. Sup. Ct. 1977) 48

Six Companies of California v. *Joint Highway District*, 311 U. S. 180 (1940) 24

Spector Motor Co. v. *McLaughlin*, 323 U. S. 101 (1944) 29

Stoner v. *New York Life Insurance Co.*, 311 U. S. 464 (1940) 24

Stubbs v. *Green Brothers Gravel Co.*, 206 So. 2d 323 (Miss. 1968) 43

Texaco, Inc. v. *Pruitt*, 396 F. 2d 237 (10th Cir. 1968) 28

Thompson v. *Consolidated Gas Co.*, 300 U. S. 55 (1937) 42

Trail Builders Supply Co. v. *Reagan*, 409 F. 2d 1059 (5th Cir. 1969), *certification order*, 410 F. 2d 763

Cases (Cont'd):

PAGE

(5th Cir. 1969), *on certification,* 235 So. 2d 482 (Fla. 1970), *on receipt of answers following certification,* 430 F. 2d 828 (5th Cir. 1970) 38

Tyler v. *Insurance Company of North America, Inc.,* 520 F. 2d 341 (5th Cir. 1975), *on certification,* 331 So. 2d 641 (Ala. 1976), *on receipt of answers following certification,* 539 F. 2d 1072 (5th Cir. 1976) 37

Union Light, Heat & Power Co. v. *U. S. District Court,* 588 F. 2d 543 (6th Cir. 1978) 28–29

United Engineers and Constructors, Inc. v. *Branham,* 550 S. W. 2d 540 (Ky. 1977) 25, 46–47

United States v. *16.33 Acres of Land in County of Dade, Florida,* 537 F. 2d 182 (5th Cir. 1976), *on certification,* 342 So. 2d 476 (Fla. 1977), *on receipt of answers following certification,* 551 F. 2d 678 (5th Cir. 1977) 37

United States v. *Davison Fuel and Dock Co.,* 371 F. 2d 705 (4th Cir. 1967) 48

United States v. *Durham Lumber Co.,* 363 U. S. 522 (1960) 41

Upper Elkhorn Coal Co. v. *Thornberry,* 564 S. W. 2d 842 (Ky. App. 1977) 23, 46

Walko Corp. v. *Burger Chef Systems, Inc.,* 554 F. 2d 1165 (D.C. Cir. 1977), *on certification,* 378 A. 2d 1100 (Md. 1977), *on receipt of answers following certification,* 568 F. 2d 1389 (D.C. Cir. 1977) 39

Wansor v. *George Hantscho Co. Inc.,* 570 F. 2d 1202 (5th Cir. 1978), *certification order,* 580 F. 2d 726 (5th Cir. 1978), *cert. denied,* 99 S. Ct. 350 (1978) 36

Ward v. *State Farm Mutual Automobile Insurance Co.,* 539 F. 2d 1044 (5th Cir. 1976) 37

West v. *American Telephone and Telegraph Co.,* 311 U. S. 223 (1940) 24

West v. *Caterpillar Tractor Co., Inc.,* 504 F. 2d 967 (5th Cir. 1974), *on certification,* 336 So. 2d 80

Cases (Cont'd):

PAGE

(Fla. 1976), *on receipt of answers following certification,* 547 F. 2d 885 (5th Cir. 1977) 36

Woods v. *Cessna Aircraft Co.,* 553 P. 2d 900 (Kan. 1976) 43, 44

Wren v. *New York Life Insurance Co.,* 493 F. 2d 839 (5th Cir. 1974) 28

Constitutional Provisions, Statutes, Rules and Regulations:

Kentucky Constitution, Sections 109-124 35

KRS 342.004 .....4–5, 14, 19–20

KRS 342.610 .....5, 14, 15, 20, 21, 23, 25, 26, 46, 47, 48

KRS 342.640 .....5–6, 49

KRS 342.690 .....6–7, 14, 20

28 U.S.C. §1254(1) 2

28 U.S.C. §1332 8

Kentucky Rules of Civil Procedure, Rule 76.37...3–4, 16, 26, 35

803 Kentucky Administrative Regulations 25:020, Section 3 ..... 7, 18

Other Authorities:

101 C.J.S. *Workmen's Compensation* § 918 (1958).. 43

2A Larson's Workmen's Compensation Law ¶ 72.20 (1976) 44

1A Moore's Federal Practice ¶ 1.307[2] (1978) 24

Restatement (Second) Agency § 213 (1958) 48

12 U.L.A., *Uniform Certification of Questions of Law Act* (1975) 40

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

BLUE DIAMOND COAL COMPANY - - - *Petitioner,*

v.

JENNIFER BOGGS, CAROL COMBS, GERALDINE COOTS, VERA GALLOWAY, LIBBY GIBBS, MADONNA GRIFFITH, DIANE MCKNIGHT, GERALDINE MCKNIGHT, PHYLLIS PEAVEY, VICKIE SCOTT, CELINDA SPARKMAN, ETHEL STURGILL, DEBBIE TURNER, REDA TURNER, and CHARLOTTE WIDNER, Administratrices of their Decedents and Individually - - - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Blue Diamond Coal Company, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on January 23, 1979, and the order entered by that court on March 9, 1979, denying the petition for rehearing with suggestion for rehearing en banc. A panel of the court of appeals in a two to one decision reversed the judgment of

the United States District Court for the Eastern District of Kentucky which had sustained Petitioner's motion for summary judgment and dismissed the complaint.

OPINIONS BELOW

The majority and dissenting opinions of the court of appeals are reported at 590 F. 2d 655 and are contained in the Appendix hereto (App., 1-17a). The memorandum opinion and the order of the district court are unreported but are contained in the Appendix hereto (App., 20-31a).

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1979 (App., 18a). A timely petition for rehearing with suggestion for rehearing en banc was denied on March 9, 1979 (App., 19a), and the mandate issued on March 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in this diversity case governed by Kentucky law the court of appeals erred in failing to certify to the Supreme Court of Kentucky the controlling questions of Kentucky law relating to the correct interpretation of the Kentucky Workmen's Compensation Act where the resolution of those questions affects vital state interests and requires an assessment of relevant state public policies?

2. Whether the court of appeals disregarded the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), when it held under the undisputed factual situation presented here that as a matter of law Petitioner as the parent corporation could be neither a "contractor" nor an "employer" immune from tort liability to the employees of its wholly owned subsidiary corporation under the Kentucky Workmen's Compensation Act where the sole business of the subsidiary was to perform mining work for Petitioner?

STATUTES, RULES AND REGULATIONS INVOLVED

1. Rule 76.37 of the Kentucky Rules of Civil Procedure adopted by the Supreme Court of Kentucky effective September 1, 1978, provides in pertinent part:

> (1) *Power to answer*
>
> The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, any Court of Appeals of the United States, or the highest appellate court of any other state or the District of Columbia when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court and the Court of Appeals of this state.
>
> (2) *Method of invoking*
>
> This Rule may be invoked by an order of any of the courts referred to in paragraph (1) of this Rule upon the court's own motion or upon the motion of any party to the cause.
>
> (3) *Contents of certification order*
>
> A certification order shall set forth
>
> (a) The questions of law to be answered;
>
> (b) A statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose;

(c) The names of each appellant and appellee; and
(d) The names and addresses of counsel for each appellant and appellee.

(4) *Preparation of certification order*

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or such portion of the record before the certifying court as it deems necessary to a determination of the questions certified to it.

(5) *Costs of certification*

Fees and costs shall be the same as in civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification and each party shall pay his share of the $100 filing fee within the 60-day period allowed by paragraph (6) of this Rule for the filing of briefs.

(6) *Briefs and argument*

Each of the parties desiring to be heard shall within 60 days after the date of the certifying order file with the clerk of the Supreme Court 10 copies of a printed brief setting forth his arguments. Oral arguments will not be required or permitted unless so ordered by the Supreme Court.

(7) *Opinion*

The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

* * * * * * *

2. Kentucky Workmen's Compensation Act, KRS 342.004, provides:

> This chapter shall be liberally construed on questions of law, as distinguished from evidence, and the rule of law requiring strict construction of statutes in derogation of the common law shall not apply to this chapter. In any proceeding for the enforcement of a claim for compensation under the law for pneumoconiosis or silicosis it is presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the law.

3. Kentucky Workmen's Compensation Act, KRS 342.610(1) and (2), provide:

> (1) Every employer subject to this chapter shall be liable for compensation for injury, occupational disease, or death without regard to fault as a cause of the injury, occupational disease, or death.
>
> (2) A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employes of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his carrier who shall become liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another (a) to have work performed consisting of the removal, excavation or drilling of soil, rock or mineral, or the cutting or removal of timber from land, or (b) to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation or profession of such person, shall for the purposes of this section be deemed a contractor, and such other person a subcontractor. This subsection shall not apply to the owner or lessee of land principally used for agriculture.

4. Kentucky Workmen's Compensation Act, KRS 342.640, provides in pertinent part:

The following shall constitute employes subject to the provisions of this chapter, except as exempted under KRS 342.650:

(1) Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and all helpers and assistants of employes whether paid by the employer or employee, if employed with the knowledge, actual or constructive, of the employer.

(2) Every executive officer of a corporation.

* * * * * * *

(4) Every person performing service in the course of the trade, business, profession or occupation of an employer at the time of the injury.

* * * * * * * *

5. Kentucky Workmen's Compensation Act, KRS 342.690(1), provides:

(1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employe, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term "employer" shall include a "contractor" covered by KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation. The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employe of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and

other benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner. The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employes, officers or directors of such employer or carrier, provided the exemption from liability given an employe, officer or director or an employer or carrier shall not apply in any case where the injury or death is proximately caused by the wilful and unprovoked physical aggression of such employe, officer or director.

6. 803 Kentucky Administrative Regulations 25:020, Section 3, provides:

Coverage of Subsidiary Corporations. Any corporation which can qualify hereunder as an own risk carrier which has wholly owned or controlled subsidiaries may qualify for itself and such subsidiary or subsidiaries in one joint application to the board, provided the parent corporation has sufficient assets to qualify as an own risk carrier both for itself and its subsidiary or subsidiaries. However, such joint application shall be accompanied by a certificate of the secretary of both the parent and the subsidiary corporation or each of the subsidiary corporations to the effect that such corporations are making such joint application and the joint and several liability of both the parent and the subsidiary or subsidiaries for all of the compensation claims asserted against them have been authorized by due and proper orders and resolutions of the respective boards of directors of such parent and each subsidiary company. Such certificates by such secretaries of the parent and subsidiary corporations shall be effective until revoked by such corporations and until the board is notified in writing of such revocation.

STATEMENT OF THE CASE

Alleging diversity of citizenship jurisdiction under 28 U.S.C. § 1332, Plaintiffs-Respondents on October 21, 1976, instituted this action against Defendant-Petitioner arising out of an explosion which occurred on March 9, 1976, in the Scotia Mine in Letcher County, Kentucky, and which resulted in the deaths of Respondents' husbands. The Scotia Mine is operated by Scotia Coal Company ("Scotia"), Petitioner's wholly owned subsidiary.

Respondents sought to recover, individually and as personal representatives of the decedents' estates, compensatory and punitive damages under Kentucky law for, *inter alia*, the alleged wrongful deaths of the decedents. The original complaint alleged that Petitioner had "been in the coal-mining business since approximately 1926"; that "for the purpose of carrying on its activities in the production and sale of coal defendant directly and through its subsidiary, Scotia Coal Company" operated three underground coal mines in Letcher County, Kentucky; and that Petitioner failed to cause the removal of unqualified supervisory and safety officers, failed to make necessary expenditures for personnel, equipment and training, failed to exercise reasonable care in supervising ventilation and safety, and failed to provide decedents with safe working conditions and a safe workplace.

On June 21, 1977, Petitioner moved for summary judgment on the ground that it was liable to Respondents for the payment of workmen's compensation benefits and was, therefore, immune from all other liability under the Kentucky Workmen's Compensation Act, KRS 342.004-.990 (the "Act"). Petitioner contended, in the alternative, that it was either an "employer," a "contractor," or a "carrier"

under the Act, any one of which would render it liable for the payment of workmen's compensation benefits and immune from all other liability. The following undisputed facts were relied upon by Petitioner in support of its motion for summary judgment:

Petitioner was originally organized in 1915 under the laws of Tennessee and was reincorporated under the laws of Delaware in 1922. During the years since its creation, Petitioner has operated well in excess of twenty underground coal mines in the states of Virginia, Kentucky and Tennessee.

On January 4, 1961, Petitioner formed Scotia as a wholly owned subsidiary for the purpose of developing a large tract of coal reserves in Letcher County, Kentucky. Prior to Scotia's formation, Petitioner had purchased or leased 12,589 acres of coal land in Letcher County, Kentucky, and 2,460 adjacent acres in Virginia and had expended substantial sums in determining the extent of the coal reserves on this property. These coal and mining rights were subsequently leased by Petitioner to Scotia. Petitioner later assigned its rights in the Scotia property to a wholly owned subsidiary corporation, and wholly owned subsidiary corporations presently sublease the coal and mining rights to Scotia. Petitioner, as one of the parties to that lease, guarantees its full performance by Scotia.

Subsequent to December 4, 1974, all coal mining operations have been carried on in the name of wholly owned subsidiary corporations of Petitioner with three subsidiary corporations including Scotia being engaged in the business of mining coal. However, the directors and officers of Petitioner hold identical positions with Scotia. The activities and operations of Scotia are managed and directed by

these officers and directors who generally also hold the same positions in, and have the same responsibilities to, Petitioner's other coal mining subsidiaries. Officers are carried on Petitioner's payroll and are paid only on its check. Their salaries are allocated on the accounting records based upon the relation between the total tonnage produced by all mines and the tonnage produced by each mine. Directors for Petitioner and each wholly owned subsidiary receive a director's fee only as directors of Blue Diamond Coal Company.

Petitioner's offices located in Knoxville, Tennessee are organized primarily into a general mining operations department, an administrative department, and a sales department. The functions performed by these departments are utilized by the various coal mining operations including Scotia as the needs of the various mines require. Salaries and other expenses incurred in the operation of these departments are paid by Petitioner and are allocated on the accounting records based primarily upon the relation between the total tonnage produced by all mines and the tonnage produced by each mine.

The Vice President of Operations is the head of the general mining operations department and is in charge of mining operations. The same individual serves in this capacity for Petitioner and for each of its coal mining subsidiaries including Scotia. The General Manager of Mines, who is carried as an employee on Petitioner's payroll, is directly responsible to the Vice President of Operations for mining operations at all coal mines. Numerous other individuals, such as the Personnel Director, Compensation Adjuster, Purchasing Agent, Chief Engineer, Industrial Engineer, Safety Engineer-All Mines, and members of Petitioner's general mining operations staff and engineering

staff, have job responsibilities with respect to all coal mining operations. Other functions utilized by all coal mining operations on a centralized basis include a central maintenance shop, a central laboratory for analyzing coal, and a central warehouse for the purchase of all supplies and equipment.

Petitioner's accounting department prepares and maintains accounting records for Petitioner and its subsidiary corporations including Scotia. Consolidated federal income tax returns are filed, and a consolidated balance sheet is prepared. Separate accounting books and ledgers are maintained for Petitioner and for Scotia although numerous accounts which would be necessary for a completely separate bookkeeping system are omitted from the Scotia books.

All coal produced by Petitioner's subsidiary corporations including Scotia is sold by Petitioner in its name, and almost all of the coal sold by Petitioner is produced by its subsidiaries. All coal is shipped as directed by Petitioner, and sales are invoiced to the customer by Petitioner. All receipts are paid to it and are deposited in its bank account and retained by it. Sales of coal are credited on the accounting records to the particular subsidiary that produced the coal so that it can be determined whether a particular mine is making or losing money, and, consequently, the Scotia ledgerbooks show income to Scotia from the sale of coal. All salesmen are on Petitioner's payroll. Petitioner does not identify the coal sold by reference to a subsidiary corporation but by reference to the mine from which it was produced and by trade name.

The cash needs of each mine are met by a transfer of funds from Petitioner to a bank account for that mine with an appropriate entry in the inter-company accounts. Money is transferred by Petitioner to a Scotia bank account only

to the extent necessary to pay expenses incurred. There is no payment of interest or cash dividends among Petitioner and its wholly owned subsidiaries. Investments are made in Petitioner's name.

Prospective employees submit applications at each mine site on a standard form prepared by Petitioner. The application of a person approved for hiring by Scotia's General Mine Superintendent is investigated by the Claims Adjuster for all mines. The application and investigative report are forwarded to Petitioner's Personnel Director for all mines and to its Administrative Vice President who have authority to disapprove hiring any applicant.

Petitioner has for many years filed a joint application with its operating subsidiaries to act as a self-insurer for workmen's compensation liabilities and has been permitted to be a self-insurer by the Kentucky Workmen's Compensation Board with liability in excess of a specified amount being covered by insurance. The bond in effect at the time of the explosion is executed solely by Petitioner and constitutes a direct obligation by it to persons entitled to sums due under the Act. The "Certificate" issued by the Kentucky Workmen's Compensation Board for the relevant period certifies that Petitioner and its named subsidiaries being engaged in the business of mining coal and being subject to the Act have made proof of financial ability to pay compensation directly. Necessary funds to provide for the payment of workmen's compensation benefits are paid into trust by Petitioner, and a bookkeeping entry is subsequently made allocating this expense.

The facts upon which Respondents primarily relied in opposition to the motion for summary judgment were that Petitioner and Scotia have separate payrolls, paychecks, and bank accounts; that they have separate federal em-

ployer identification numbers and file separate payroll tax withholding returns; that the bargaining unit employees at Scotia are covered by a collective bargaining agreement entered into by Scotia and the Scotia Employees Association, Inc.; and that Petitioner and Scotia have over the years sued and been sued in their respective corporate names and have been identified by their separate corporate names in various legal documents and government filings.

The district court, by order of July 26, 1977, passed the motion for summary judgment to the merits. Shortly thereafter, Respondents filed an amended complaint which deleted many of the allegations contained in the original complaint. The amended complaint alleged that Petitioner "provides management, sales, accounting, engineering, investment and other services" to Scotia including services relating to mine safety. It was alleged that Petitioner "had begun to prepare for the resumption of daily mining in the deadend heading of Two Southeast Mains" and had decided to open and operate a new section without proper preparation and planning; that Petitioner "caused, encouraged, permitted to continue, and failed to correct" various conditions and practices in the Scotia Mine; and that Petitioner failed to authorize, approve, or permit necessary expenditures for personnel, equipment, and training and failed to exercise reasonable care in supervising ventilation and safety at the Scotia Mine.

A trial before a jury commenced on September 6, 1977. At the close of Respondents' case after three days of testimony before the jury, Petitioner moved for a directed verdict and also renewed its motion for summary judgment. After hearing arguments, the district court orally sustained Petitioner's motion for summary judgment.

A separate Order and Memorandum Opinion were entered on September 21, 1977. The district court stated (App., 27a):

> The undisputed course of conduct between Blue Diamond and Scotia, considered as contracting parties, is clear. The intent of the parties as to their respective functions in the Oven Fork, Kentucky mining operation and the consideration to be exchanged between them are beyond doubt. I find a contract to exist between the parties from 1962 to date.

The district court held that the contract was for Scotia to perform work for Petitioner which involved the removal, excavation or drilling of mineral or which was a part of Petitioner's regular or recurrent business or occupation (App., 28a). Accordingly, the present common law action was held barred because Petitioner was a "contractor" within the meaning of KRS 342.610 and was exempt from tort liability under KRS 342.690 which provides that the liability of an "employer" under the Act "shall be exclusive and in place of all other liability" and that an "employer" shall "include a 'contractor' covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation."

Respondents appealed to the United States Court of Appeals for the Sixth Circuit. On January 23, 1979, that court rendered its opinion, written by Judge Merritt with Judge Cecil concurring and Judge Peck dissenting, reversing Judge Hermansdorfer and holding that Petitioner is neither an "employer" nor a "contractor" within the meaning of the Act. The majority opinion rests essentially upon three premises:

(1) The principle requiring workmen's compensation statutes to be liberally construed (KRS 342.004) does not

apply if immunity from tort liability is the issue. The majority so held despite the fact that it is well settled that workmen's compensation statutes are to be liberally construed regardless of whether the injured party seeks to invoke their protection or to deny coverage.

(2) Petitioner did not contract with Scotia within the meaning of KRS 342.610 for Scotia to perform work for the parent company thereby making it liable for workmen's compensation benefits and conversely immune from a tort action. The majority so held notwithstanding the district judge's finding that a contract did exist between Petitioner and Scotia and the recognition by the court of appeals that Scotia performed mining work for Petitioner.

(3) Petitioner was not an "employer" under the Act so as to be subject to workmen's compensation liability and to be immune from tort liability. The majority so held despite its earlier holding that Petitioner and Scotia were not sufficiently separate to be regarded as contracting parties within the meaning of KRS 342.610.

As noted in Judge Peck's dissenting opinion, "the majority's decision means that a parent company *cannot* be held liable for Workmen's Compensation benefits owed to the employees of its subsidiary" (App., 17a). Thus, the holding of the majority opinion will obviously lessen the incentive for the parent to maintain workmen's compensation coverage and, as a corollary, to be responsible for safety functions in that workmen's compensation and safety are interrelated, the injury experience having a direct bearing on the cost of workmen's compensation coverage. Under the majority opinion, the parent can free itself from these workmen's compensation obligations with impunity and is encouraged to withdraw from involvement with safety func-

tions because to do otherwise would subject it to potential but undefined tort liability.

Petitioner timely filed a petition for rehearing with a suggestion for rehearing en banc. In that petition the court of appeals was requested to make use of Rule 76.37 of the Kentucky Rules of Civil Procedure which authorizes the Kentucky Supreme Court to answer questions of law certified to it by a United States Court of Appeals. On March 9, 1979, the court of appeals entered its order summarily denying the petition for rehearing and reciting that a majority of the judges had not requested a rehearing en banc (App., 19a). That order did not indicate what, if any, consideration had been given to invoking Kentucky's recently adopted certification procedure and did not state why that procedure was not employed to authoritatively determine the controlling issues of Kentucky law.

REASONS FOR GRANTING THE WRIT

I. In Ignoring Kentucky's Certification Procedure and Refusing to Certify to the Supreme Court of Kentucky the Controlling Public Policy Issues Involved as to the Proper Interpretation of Kentucky's Workmen's Compensation Act, the Court of Appeals Adopted an Approach Patently Contrary to the Teachings of This Court.

A. This Case Presents Substantial Issues of Kentucky Statutory Law Involving Important State Public Policy Considerations.

The availability of the workmen's compensation defense to bar maintenance of the present action turns upon the interpretation of several key sections of Kentucky's Workmen's Compensation Act. The proper construction of these sections undeniably is of the utmost importance to administration and implementation of Kentucky's Workmen's Compensation Act. All of the sections of the Act relied upon by Petitioner were added as a part of extensive amendments to the Act in 1972 and were patterned upon model legislation recommended by the Council on State Governments. The construction of these key sections of the Act for the first time with respect to the precise situation presented here should be made by the Supreme Court of Kentucky.

Faced with the present decision, a parent corporation such as Petitioner could take one of two courses of action either of which would have a profound impact upon Kentucky law. If the parent is not liable for workmen's compensation, its incentive to maintain that coverage is lessened and its concern with safety measures, which have a direct bearing upon the cost of maintaining workmen's compensation coverage, will be correspondingly reduced. At the same time, a parent is further encouraged to withdraw its involvement (and its purse strings) in order to maintain the established balance between liability without regard to fault for compensation and immunity from tort liability. On the other hand, a parent corporation deciding not to withdraw from such direct operational involvement may deem it necessary to dissolve or alter its existing corporate structure in order to restore that balance. In either event, these potential ramifications of the present decision should be evaluated by the Supreme Court of Kentucky rather than by the court of appeals which, although referring to the absence of Kentucky law, refused to use the only certain way to determine state law.

The majority opinion refers to certain social policy considerations such as the alleged inadequacy of workmen's compensation benefits and the need for occupational safety. To the extent that these considerations are matters for

judicial rather than legislative resolution, Kentucky's public policy is peculiarly suited for consideration by the Kentucky Supreme Court and not by the court of appeals.

On the other hand, the majority opinion fails to properly assess or consider highly relevant public policies underlying Kentucky's workmen's compensation scheme. For example, the majority does not consider whether its decision may frustrate the regulatory policy adopted by the Kentucky Workmen's Compensation Board, the state agency charged with administration of the Act, authorizing a parent corporation to qualify as a self-insurer for itself and its wholly owned or controlled subsidiaries so that the parent and subsidiary corporations are jointly and severally liable for all compensation claims asserted against them. 803 KAR 25:020, Section 3.

Moreover, as noted in Judge Peck's dissenting opinion, the effect of the decision is to insulate a parent corporation such as Petitioner from liability for workmen's compensation benefits to employees of its wholly-owned subsidiary corporation. Where the parent-subsidiary relationship is adopted as a means of carrying on an integrated business operation with the parent actively controlling and directing the operations of the subsidiary in carrying out the business, the clear effect of the decision is to undermine a fundamental policy of workmen's compensation laws. That policy is that those who carry on and benefit from a business should be directly responsible to the workers to provide without regard to fault guaranteed payments to all injured employees and should not be allowed to avoid that obligation by getting work done through others.

The majority acknowledges that there is no question that Scotia performed mining work for Petitioner. Certainly the policy of contractor-under statutes to prevent evasion

of workmen's compensation obligations applies regardless of whether a corporation decides to accomplish its business by interposing an unrelated third party or a wholly owned subsidiary, between itself and the employees who are utilized in performing that business. Simply stated, this case requires an assessment of important state policies and that assessment should be made by the Supreme Court of Kentucky.

B. Certification Was Mandatory Where the Majority Opinion Was Without Basis in Kentucky Law.

In an obviously result oriented opinion, the majority either fails to correctly apply or ignores Kentucky law bearing directly upon the important issues of Kentucky statutory law presented by this case. There exists no controlling precedent for the majority's decision which is so lacking in support in Kentucky law as to render certification mandatory.

First, the majority bases its decision upon the statement that "[c]ourts have responded by liberally construing the coverage provisions of workmen's compensation acts while narrowly construing the immunity provisions" (App., 6a) and that "Kentucky courts have given the 'liberal' construction required by the express language of the Act by broadly construing the coverage provisions of the Act and narrowly construing the immunity provisions" (App., 7a). As is more fully discussed in Section III of this Petition, the universally accepted rule is that workmen's compensation statutes are to be liberally construed regardless of whether the injured party seeks the protection of those statutes or to deny coverage and that one who can be held liable for workmen's compensation is not liable in tort. The Act specifically states that it "shall be liberally construed" (KRS

342.004), and the exclusive remedy provision (KRS 342.690) is a part of the Act. To apply a double standard and construe the Act liberally or narrowly depending upon the remedy sought by the injured worker would plainly violate the Act.

The majority opinion cites its earlier decision in *Bryant* v. *Old Republic Insurance Co.*, 431 F. 2d 1385 (6th Cir. 1970), for the proposition that the Kentucky court "*seems* to be narrowing the concept of employer's immunity" under the Act. (Emphasis added.) *Bryant* was itself a two to one decision where the Sixth Circuit rejected the view of an experienced Kentucky federal district court judge and held an insurance company subject to a tort suit under Kentucky law for negligently inspecting, or failing to inspect, a coal mine on which it was the workmen's compensation carrier. At the next regular session of the Kentucky legislature in 1972, the Kentucky General Assembly extensively amended the Act to broaden its coverage and, as a part of those amendments, specifically overruled the result in *Bryant*. Yet, the majority opinion continues to rely on *Bryant* and refuses to certify the question to the only court which would not need to guess what "seems" to be the Kentucky law but which could conclusively adjudicate the issue.

Secondly, the majority's construction of Kentucky's contractor-under statute (KRS 342.610) is of such questionable validity as to require certification of this important state public policy question.[1] The majority opinion concludes

[1]In this regard it is noteworthy that the court of appeals neglected to refer to the only decision cited to it specifically considering the applicability of a "contractor under" statute similar to KRS 342.610 in the parent-subsidiary context. *Coco* v. *Winston Industries*, 330 So. 2d 649 (La. App. 1975), *judgment set aside on other grounds*, 341 So. 2d 332 (La. 1976), directly holds that, as applied to the parent corporation, a parent-subsidiary relationship under facts similar to those existing here is covered by a statute like KRS 342.610.

that there is no question that Scotia performed mining work for Petitioner and that the only question was whether the work was performed pursuant to a "contract." The majority cites *Elkhorn-Hazard Coal Land Corp.* v. *Taylor*, 539 S. W. 2d 101 (Ky. 1976), as authority that the phrase "one who contracts" contained in KRS 342.610 should be read narrowly in that it "*appears* to contemplate a regular, enforceable contract between independent parties dealing with each other at arm's length." (Emphasis added.)

Here again, the court speculates as to what "appears" to be the Kentucky law rather than allowing the Kentucky court to reliably adjudicate that issue. The court's construction is an unmistakable example of judicial legislation and undercuts the whole philosophy underlying workmen's compensation laws. To reach a result which would allow an injured worker's compensation claim to be defeated by the parent corporation because of some defect in a contract between it and its subsidiary would be a definite step backward in an area where workmen's compensation laws have been substantially improved for workers in recent years.

Elkhorn-Hazard simply held that a lessor of coal land like any other lessor is not liable to the lessee's employees for workmen's compensation benefits. There was no issue in that case as to the existence of a contract because there was a formal written lease. It would be an unprecedented departure from existing law if any court should hold that an ordinary lessor is merely by reason of the lease liable for workmen's compensation benefits to the lessee's employees. The Kentucky court succinctly stated the reasons why the "contractor under" statute did not apply in that case:

> In this case however there is no lease of premises to be used as a marketing outlet and aside from a pro-

vision in its articles of incorporation listing mining as one of its many business purposes there is no evidence in the record upon which it could be concluded reasonably that Elkhorn-Hazard has actually engaged in the business of mining.

There is no basis in the record for a conclusion that Elkhorn-Hazard was conducting a mining business through the use of a lease or that it was conducting any work through the use of a lease which was a regular part of its business operations and which normally would have been accomplished through the use of its own employees.

It does not appear to us that the lease can be construed as a contract to have work done for Elkhorn-Hazard. The work performed by M & A Coal Company was done for itself in a proprietary capacity. M & A Coal Company was mining the coal for its own use and not for Elkhorn-Hazard. Under the lease in question M & A Coal Company alone benefited from increases in the market price of coal or from efficiencies in operation. Likewise M & A alone bore the loss of decreased prices or inefficient operation.

* * *

There is no showing in the record that the lease arrangement resulted in a payment to M & A Coal Company of a price less than the true market value or price of the coal. Consequently we do not regard it as a matter of controlling importance that the lease required the coal to be weighed at the tipple of corporations controlled by the president of Elkhorn-Hazard.

539 S. W. 2d at 104-05. As noted in the opinion of the district court, "[e]ach of the factors identified by the *Elkhorn-Hazard* court as being factually material to application of the Act is satisfied by undisputed facts in the instant case" (App., 28a).

The majority's narrow construction of KRS 342.610 directly conflicts with the decision of the Kentucky Court of Appeals in *Upper Elkhorn Coal Co.* v. *Thornberry,* 564 S. W. 2d 842 (Ky. App. 1977) (discretionary review denied by Kentucky Supreme Court on May 16, 1978). The court there held, in a closely analogous situation, that KRS 342.610 was applicable and that the company was liable for workmen's compensation benefits to the dependents of a deceased miner because the company received the benefit of the coal production. The decisive effect of this decision is vividly demonstrated in Judge Peck's dissenting opinion (App., 16-17a):

> For example, in *Upper Elkhorn Coal Co.* v. *Thornberry,* Ky. App., 564 S. W. 2d 843 (1977), the Coal Company was being sued for Workmen's Compensation benefits. The Company argued that it was not a contractor under the Act, and thus not liable for benefits. A partnership owned the lease for the coal fields, and had contracted with the decedent's employer to produce coal and deliver it to Upper Elkhorn. Despite the fact that there was no contract at all with Upper Elkhorn, much less a "formal" one, the court held that the company was liable for benefits under the Act as a "contractor" because the two partners were acting for the benefit of Upper Elkhorn. It noted that the purpose of the arrangement was to secure production for Elkhorn, and that the benefit of all coal production fell to Upper Elkhorn. Similarly, in this case, there may not be a formal contract, but there is certainly an "arrangement," through which Blue Diamond obtains the benefit of the production of coal.

Astonishingly, the majority opinion makes no effort to consider the effect of *Upper Elkhorn* upon the proper interpretation of KRS 342.610 and does not even cite that de-

cision. There can be no doubt, however, that the court of appeals was required to give effect to that decision under the *Erie* doctrine. The rule is summarized as follows in 1A Moore's Federal Practice ¶ 1.307[2] (1978):

> [W]here the state law supplies the rule of decision, it is the duty of federal courts to ascertain and apply that law even though it has not been expounded by the highest state court, and * * * since a lower state court is an organ of the state, its determination, in the absence of more convincing evidence of what the state law is, must be followed by a federal court in deciding a question governed by state law.
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> * * *
>
> Where the federal court, however, cannot, on the available materials, make a confident guess how the state's highest court would rule on a particular point, certification to the state's highest court, if available, should be utilized.

As was stated in *West* v. *American Telephone and Telegraph Co.*, 311 U. S. 223 (1940):

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

311 U. S. at 237. *See also Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169 (1940); *Six Companies of California* v. *Joint Highway District*, 311 U. S. 180 (1940); *Stoner* v. *New York Life Insurance Co.*, 311 U. S. 464 (1940); *Cf. Commissioner* v. *Estate of Bosch*, 387 U. S. 456 (1967).

Nor does the majority opinion refer to several other Kentucky cases which are clearly not consistent with its

narrow construction of KRS 342.610. For example, *United Engineers and Constructors, Inc.* v. *Branham*, 550 S. W. 2d 540 (Ky. 1977), indicates how the Kentucky court would rule on this issue. In that common law action for damages where the Kentucky court held that substance must prevail over form in considering the existence of an employment relationship, one question related to the existence of a subcontract. The court said:

> Whether that arrangement justifies the inflexible label of "subcontract" as it might be considered apart from the compensation statutes we need not decide. Under those statutes, however, we think that it does. . . . In the "up-the-ladder" context we construe the relationship between United and Lowman to have been that of contractor and subcontractor. United therefore was not "some other person than the employer."

550 S. W. 2d at 547.

That the Kentucky court will not adopt a narrow statutory construction which would allow avoidance of workmen's compensation liability is further indicated by the result reached when one subject to an employer's control hires others to assist him in the performance of the business. Those so hired will be deemed employees, and the employer will not be liable in tort but will be prevented from avoiding liability for workmen's compensation benefits in this fashion. *Mahan* v. *Litton*, 321 S. W. 2d 243 (Ky. 1959). *See King* v. *Shelby Rural Electric Cooperative Corp.*, 502 S. W. 2d 659 (Ky. 1973), *cert. denied*, 417 U. S. 932 (1974).

Thirdly, the majority's reasoning in holding that Petitioner is not an "employer" represents but further evidence, as is more fully discussed in Section III of this Petition, that certification was essential. In discussing the "con-

tractor-under" issue, the majority for all practical purposes holds the finding of the district court that a contract existed to be clearly erroneous; it refuses to accept the proposition that a parent and subsidiary corporation can enter into a contract implied in fact although it is beyond question that contracts implied in fact are recognized under Kentucky law. The majority even implies that a parent and subsidiary cannot enter into a contractual relationship. The majority thus effectively disregards the separateness of the corporations when considering the issues raised under KRS 342.610. However, in concluding that Petitioner and its wholly owned subsidiary cannot be considered a single, integrated enterprise for purposes of the Act, the majority again adopts a double standard and blatantly ignores the reasoning employed in deciding that Petitioner and Scotia are too close to contract for purposes of the issues raised under KRS 342.610. We submit that the Supreme Court of Kentucky, if given the chance, would not adopt such a tortured, illogical, and contradictory line of reasoning.

C. Certification Was The Only Sensible Alternative Once It Became Apparent the Federal Judges Who Considered the Case Were in Disagreement as to the Correct Interpretation of Kentucky Law.

This case was argued and submitted for decision prior to adoption by the Kentucky Supreme Court of Rule 76.37. However, Rule 76.37 became effective on September 1, 1978, several months prior to rendition of the decision on January 23, 1979. It is our contention that the need for certification became acutely apparent during the course of deliberation by the court of appeals and that that court should have invoked Rule 76.37 sua sponte and, in any event, should have made use of the certification procedure

when requested to do so by Petitioner on petition for rehearing.

The majority opinion states that this case raises "serious questions of first impression under Kentucky's Workmen's Compensation Act" (App., 2a); that the Act does not "address the question of a parent corporation's immunity from common law tort liability for injuries to its subsidiary's employers, [sic] nor does the Kentucky case law interpreting the Act"; and that "[f]ew cases from other jurisdictions touch upon the question, and the general legal literature in the field does not deal with it" (App., 5a). As previously indicated, Kentucky law is not nearly so devoid of guidance as the majority would have one believe. The majority opinion in fact ignores or misapplies relevant Kentucky law and is so lacking in controlling Kentucky precedent as to have required certification. However, under the majority's own characterization, the need for certification is clear. Instead, the court of appeals chose to rely upon abstract law review articles and theories of jurisprudence espoused by the legal commentators rather than upon the judicial pronouncement of the only court which could authoritatively answer the important issues raised by this case.

The case for certification became even more compelling once it became apparent that the federal judges who considered the case could not agree as to the applicable Kentucky law. At the time the case was submitted to the court of appeals, a respected federal district court judge experienced in Kentucky law had rendered an opinion analyzing applicable Kentucky law and applying it to the factual situation. In view of the nature of the questions involved, established practice dictated that great weight be accorded Judge Hermansdorfer's view as to Kentucky law.

The rule is well settled in the Sixth Circuit that, when state courts have not adjudicated a doubtful question of

statutory construction, considerable weight must be given to the view of the district judge as to the law of the state in which he sits. *Martin* v. *University of Louisville*, 541 F. 2d 1171 (6th Cir. 1976); *Filley* v. *Kickoff Publishing Co.*, 454 F. 2d 1288 (6th Cir. 1972); *Rudd-Melikian* v. *Merritt*, 282 F. 2d 924 (6th Cir. 1960); *In Re Glassman*, 262 F. 2d 857 (6th Cir. 1958). That rule is established in other circuits as well. *See, e.g., American Timber and Trading Co.* v. *First National Bank of Oregon*, 511 F. 2d 980 (9th Cir. 1973), *cert. denied*, 421 U. S. 921 (1975) (clearly wrong); *Wren* v. *New York Life Insurance Co.*, 493 F. 2d 839 (5th Cir. 1974) (great weight); *Brennan* v. *University of Kansas*, 451 F. 2d 1287 (10th Cir. 1971) (clearly erroneous); *Texaco, Inc.* v. *Pruitt*, 396 F. 2d 237 (10th Cir. 1968) (court of appeals would accept federal trial judge's interpretation of Utah Workmen's Compensation Act unless convinced that he was clearly wrong).

Thus, once the court of appeals recognized that it might not follow the view of a Kentucky district judge as to an important issue of unsettled statutory law, the need for certification should have been apparent, and the available certification procedure should have been used. With all due deference, neither of the two judges who formed the majority can be regarded as having any expertise in Kentucky law. The majority certainly cannot claim to be as conversant with Kentucky law as the district judge who sits in Kentucky and obviously was not as well qualified to determine Kentucky law as the Kentucky Supreme Court would have been.

There can be no doubt the court was aware of the certification procedure prior to rendering its decision. The author of the majority opinion in fact referred to Kentucky's certification procedure with approval in *Union*

Light, Heat and Power Co. v. *U. S. District Court*, 588 F. 2d 543 (6th Cir. 1978) (argued October 31, 1978), a case similar to this in that both involve highly publicized and tragic incidents in recent Kentucky history, *i.e.*, the Beverly Hills Supper Club fire in Northern Kentucky and the Scotia Mine explosions in Eastern Kentucky.

Moreover, if there was ever any doubt about the need for certification that doubt disappeared when it developed that the appeals court would not only reject the view of an experienced Kentucky federal district judge but could not itself agree as to the proper interpretation of the Act. *See Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 104 (1944), where, in ordering abstention, this Court stated: "That the answers are not obvious is evidenced by the different conclusions as to the scope of the statute reached by the two lower courts." The net effect is that the federal judges who heard this case are evenly divided as to whether the present common law action is barred under Kentucky law. Nevertheless, the court of appeals refused to allow the only court which could authoritatively resolve this deadlock to do so.

D. Under the Circumstances Presented by This Case Certification was Required by the Decisions of this Court.

In light of the foregoing circumstances, certification of the important issues of Kentucky law raised by this case affecting the state's public policy in administering its workmen's compensation law was mandatory and the failure to certify those issues was a clear abuse of discretion. Specific attention was first directed to the use of a state certification procedure in *Clay* v. *Sun Insurance Office*, 363 U. S. 207 (1960), *on certification*, 133 So. 2d 735 (Fla. 1961), a diversity action seeking recovery on an insurance policy. The

district court had awarded judgment to petitioner based upon a Florida statute, but the court of appeals reversed on the ground the Florida statute could not be applied, consistent with due process, to a policy made in Illinois. Noting that the court of appeals had indicated it could not make a confident guess how the Florida Supreme Court would construe the statute, this Court in reversing stated that the Florida legislature

> with rare foresight, has dealt with the problem of authoritatively determining unresolved state law involved in federal litigation by a statute which permits a federal court to certify such a doubtful question of state law to the Supreme Court of Florida for its decision. * * * Even without such a facilitating statute we have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law.

363 U. S. at 212.

Shortly thereafter, this Court itself invoked Florida's certification procedure in *Aldrich* v. *Aldrich*, 375 U. S. 75, 249 (1963), to obtain an authoritative answer to questions of Florida law. The advisability of certification quickly became apparent when, after receiving the answers of the Florida Supreme Court (163 So. 2d 276 (Fla. 1964)), this Court summarily reversed noting that it had become "plain that the judgment of the Supreme Court of Appeals of West Virginia, based as it was on a misapprehension regarding the law of a sister state, cannot stand." *Aldrich* v. *Aldrich*, 378 U. S. 540, 543 (1964). *See also Dresner* v. *City of Tallahassee*, 375 U. S. 136 (1963), *on certification*, 164 So. 2d 208 (Fla. 1964), where this Court also invoked Florida's certification procedure.

The wisdom of certification was again demonstrated in *Lehman Brothers* v. *Schein*, 416 U. S. 386 (1974), where the point had been first presented to the court of appeals on petition for rehearing. In reversing and remanding for consideration of the propriety of invoking certification, the Court stated the following guidelines:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.
>
> Here resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State.

416 U. S. at 390-91. The Supreme Court of Florida subsequently rejected the majority opinion originally rendered by the Second Circuit and approved the dissenting opinion of Judge Kaufman. *On certification*, 313 So. 2d 739 (Fla. 1975), *on receipt of answers following certification*, 519 F. 2d 453 (2nd Cir. 1975).

This Court again spoke with approval of certification in *Bellotti* v. *Baird*, 428 U. S. 132 (1976), an abstention case where a three-judge district court had enjoined operation of a Massachusetts statute governing the type of consent required before an abortion could be performed on an unmarried woman under eighteen. In holding abstention appropriate and remanding for certification of relevant issues of state law, the Court noted that it often had remarked that the equitable practice of abstention is limited by considerations of delay and expense but that the availability of an adequate certification procedure does in the long run save time, energy and resources and helps build a cooperative

judicial federalism. The Court observed that in abstention cases the availability of certification greatly simplifies the analysis.

At issue in *Elkins* v. *Moreno*, 435 U. S. 647 (1978), was whether non-immigrant alien residents of Maryland had been wrongly denied "in-state" status for tuition purposes under federal law. This Court concluded that whether "G-4" aliens had capacity to acquire Maryland domicile turned in part upon Maryland common law and sua sponte certified that issue to the Court of Appeals of Maryland. The Court observed that, in a federal system, it is

> desirable that questions of law which, like domicile, are both intensely local and immensely important to a wide spectrum of state government activities be decided in the first instance by state courts. This may not always be possible nor is it always required, but where as here there is an efficient method for obtaining a ruling from the highest court of a state we do not hesitate to avail ourselves of it.

435 U. S. at 662 n. 16.

Decisions of this Court directing abstention under circumstances similar to those existing here clearly support the conclusion that the court of appeals should have used the far less drastic and more desirable certification procedure. For example, in *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25 (1959), the city had filed a petition for expropriation in state court for the taking of land and the action was removed to federal court. In upholding the action of the district court which on its own motion stayed proceedings and directed the parties to secure a declaratory judgment in state court, this Court noted that a statute seemed to grant the power exercised by the city but stated:

> But that statute has never been interpreted, in respect to a situation like that before the judge, by the Louisiana courts and it would not be the first time that the authoritative tribunal has found in a statute less than meets the outsider's eye. Informed local courts may find meaning not discernible to the outsider. The consequence of allowing this to come to pass would be that this case would be the only case in which the Louisiana statute is construed as we would construe it, whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours.

360 U. S. at 30.

In *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 391 U. S. 593 (1968), at issue was whether a trespass was permitted by state law in order to use water rights. In a per curiam opinion, this Court reversed holding that the court of appeals erred in denying a motion to stay until the state law issues could be settled in a declaratory judgment suit then pending in state court.[2] The state law issues were deemed of "vital concern" to the state and the issue to be "a truly novel one." Sound judicial administration required "that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and land owners concerned with the use of this vital state resource." 391 U. S. at 594. Following this Court's decision, the Supreme Court of Nevada determined that a private corporation did have the right to condemn under state law for the purpose of securing water and expressly rejected the holding of the Tenth Circuit. *Kaiser Steel Corp.* v. *W. S. Ranch Co.*, 467 P. 2d 986 (N. M. 1970). *See also Reetz* v. *Bozanich*, 397 U. S. 82 (1970), where this Court held that a

[2]The motion to abstain apparently was made on petition for rehearing. *See W. S. Ranch Co.* v. *Kaiser Steel Corp.*, 388 F. 2d 257 (10th Cir. 1967).

stay should have been granted so that the first judicial application of Alaska constitutional provisions pertaining to a natural resource the management of which was a matter of great state concern would be by an Alaska court.

The scope and proper application of Kentucky's Workmen's Compensation Act is unquestionably of grave concern to Kentucky. The present case requires an assessment of relevant state public policies in the context of the present factual situation, and, as noted in the majority opinion, the multi-unit enterprise is now the norm in the American economy. The statutes construed by the courts below have been considered by the Supreme Court of Kentucky on only one other occasion and have never been interpreted by Kentucky's highest court with respect to the precise situation presented here. In view of the importance of the issues presented and the fact that the federal judges considering the case were divided as to the proper resolution of these difficult state law issues, the failure to certify the issues to the Supreme Court of Kentucky was an abuse of discretion and in conflict with principles established by the foregoing decisions of this Court.

With certification, the decision of the court of appeals need not rest upon a speculative forecast but could be based upon an authoritative determination. With certification, uniformity of state law could be assured, and the parties would have the benefit of the same rule which would be applied in a state court. Future litigants would know whether claims such as those asserted here are maintainable under Kentucky law, and a possible conflict with later state court decisions would be avoided.

With certification, determination of an important question of statutory law involving a significant policy choice for the state would be made by the court which should make

that determination. By enacting the certification procedure, it must be assumed that the Kentucky Supreme Court indicated its desire to decide such important questions of Kentucky law.

With certification, the disadvantages associated with abstention would be largely avoided. For example, under Rule 76.37 of the Kentucky Rules of Civil Procedure, each party may within 60 days after the date of the certifying order file a brief setting forth his position. Oral argument will not be permitted unless specifically ordered by the Supreme Court of Kentucky. Thus, the added expense is not that of a separate lawsuit but only of additional briefing. The delay is not that of instituting a separate lawsuit and proceeding through state trial and appellate courts but only the sixty day period plus the time required to obtain the answers to the certified questions from the Kentucky Supreme Court. In this respect, it is significant that Kentucky has recently adopted a new judicial article, Kentucky Constitution, Sections 109-24, creating an intermediate appellate court in Kentucky. In view of Kentucky's recent reform of its judicial system, the workload of the Supreme Court of Kentucky has been substantially reduced, and certification to that court of the questions raised by this case would not result in any undue delay.

II. The Court of Appeals' Disregard of Kentucky's Certification Procedure Directly Conflicts With the Established Practice Adopted by Other Circuits Under Similar Circumstances.

Under the established practice in other circuits, Kentucky's certification procedure would have been utilized before deciding this case of "first impression under Kentucky's Workmen's Compensation Act." However, the court

of appeals apparently did not even consider certification. The opinion makes no reference to it and the order denying the petition for rehearing does not refer to it or indicate why certification was not used as requested on petition for rehearing.

The leading exponent of certification has been the Fifth Circuit. One of the early cases in which it invoked Florida's certification procedure was *Green* v. *American Tobacco Co.*, 304 F. 2d 70 (5th Cir. 1962). In that case, a petition for rehearing was granted to the extent necessary to permit certification because of the importance of the question and because one judge had dissented on the original hearing of the case. The Florida Supreme Court later came to a different conclusion on the issue certified (154 So. 2d 169 (Fla. 1963)), and the Fifth Circuit observed that it had been saved "from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice." *Green* v. *American Tobacco Co.*, 325 F. 2d 673, 674 (5th Cir. 1963), *cert. denied*, 377 U. S. 943 (1964), *on appeal after retrial*, 391 F. 2d 97 (5th Cir. 1968), *rev'd on rehearing en banc*, 409 F. 2d 1166 (5th Cir. 1969).

The certification procedure has since been utilized by the Fifth Circuit on a wide range of issues including the following: application of the doctrine of strict liability in tort[3]; tolling of statute of limitations[4]; proper interpretation of insurance policies[5]; effect under state law of commercial and real estate transactions[6]; legality of prices charged by wholesaler under state's regulatory scheme for alcoholic beverages[7]; exemption from state ad valorem taxation[8]; recovery for mental anguish, humiliation, and embarrassment based upon breach of insurance contract[9]; validity and enforceability of surety bonds[10]; mother's contributory negligence as barring father's right to sue for his child's wrongful death[11]; and application by Florida court of an Illinois monetary limitation on damages recoverable for wrongful death of a Florida citizen in Illinois.[12]

The Fifth Circuit has frequently used certification to resolve questions relating to the proper interpretation of

[3] *Wansor* v. *George Hantscho Co., Inc.*, 570 F. 2d 1202 (5th Cir. 1978), *certification order*, 580 F. 2d 726 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 350 (1978) (Georgia law); *West* v. *Caterpillar Tractor Co., Inc.*, 504 F. 2d 967 (5th Cir. 1974), *on certification*, 336 So. 2d 80 (Fla. 1976), *on receipt of answers following certification*, 547 F. 2d 885 (5th Cir. 1977) (Florida law).

[4] *Nardone* v. *Reynolds*, 508 F. 2d 660 (5th Cir. 1975), *on certification*, 333 So. 2d 25 (Fla. 1976), *on receipt of answers following certification*, 538 F. 2d 1131 (5th Cir. 1976) (Florida law).

[5] *Aetna Casualty & Surety Co.* v. *Hertz Corp.*, 573 F. 2d 306 (5th Cir. 1978) (Louisiana law); *Tyler* v. *Insurance Company of North America, Inc.*, 520 F. 2d 341 (5th Cir. 1975), *on certification*, 331 So. 2d 641 (Ala. 1976), *on receipt of answers following certification*, 539 F. 2d 1072 (5th Cir. 1976) (Alabama law).

[6] *In Re McClintock*, 558 F. 2d 732 (5th Cir. 1977), *on certification*, 241 S. E. 2d 831 (Ga. 1978), *on receipt of answers following certification*, 571 F. 2d 317 (5th Cir. 1978) (Georgia law); *United States* v. *16.33 Acres of Land in County of Dade, Florida*, 537 F. 2d 182 (5th Cir. 1976), *on certification*, 342 So. 2d 476 (Fla. 1977), *on receipt of answers following certification*, 551 F. 2d 678 (5th Cir. 1977) (Florida law).

[7] *Castlewood International Corp.* v. *Simon*, 564 F. 2d 695 (5th Cir. 1977) (Florida law).

[8] *Matters of Cedars of Lebanon Hospital Corp., Inc.*, 546 F. 2d 63 (5th Cir. 1977), *on certification*, 355 So. 2d 1202 (Fla. 1978), *on receipt of answers following certification*, 574 F. 2d 1323 (5th Cir. 1978) (Florida law).

[9] *Ward* v. *State Farm Mutual Automobile Insurance Co.*, 539 F. 2d 1044 (5th Cir. 1976) (Louisiana law).

[10] *Cincinnati Insurance Co.* v. *City of Talladega, Alabama*, 529 F. 2d 718 (5th Cir. 1976), *on certification*, 342 So. 2d 331 (Ala. 1977), *on receipt of answers following certification*, 552 F. 2d 128 (5th Cir. 1977) (Alabama law).

[11] *Martinez* v. *Rodriquez*, 394 F. 2d 156 (5th Cir. 1968), *on certification*, 215 So. 2d 305 (Fla. 1968), *on receipt of answers following certification*, 410 F. 2d 729 (5th Cir. 1969) (Florida law).

[12] *Hopkins* v. *Lockheed Aircraft Corp.*, 358 F. 2d 347 (5th Cir. 1966), *on certification*, 201 So. 2d 743 (Fla. 1967), *on receipt of answers following certification*, 394 F. 2d 656 (5th Cir. 1968) (Florida law).

workmen's compensation statutes. For example, in *Blanchard* v. *Engine & Gas Compressor Services, Inc.*, 575 F. 2d 1140 (5th Cir. 1978), *certification order*, 590 F. 2d 594 (5th Cir. 1979), the Fifth Circuit, referring to the certification procedure as an important device of federalism, has requested the Louisiana Supreme Court to determine the meaning of a statutory employee under Louisiana's workmen's compensation statute.

At issue in *Allen* v. *Estate of Carman*, 446 F. 2d 1276 (5th Cir. 1971), *on certification*, 281 So. 2d 317 (Fla. 1973), *on receipt of answers following certification*, 486 F. 2d 490 (5th Cir. 1973), was whether the defendant employer could invoke the exclusive remedy provision of Florida's workmen's compensation statute to bar maintenance of the common law action. In certifying that issue the court stated that it deferred to the state court because "assessments of legislative policies underlying the statute are involved here, and because such matters are peculiarly within the competence of State courts * * *" 446 F. 2d at 1277.

In *Trail Builders Supply Co.* v. *Reagan*, 409 F. 2d 1059 (5th Cir. 1969), *certification order*, 410 F. 2d 763 (5th Cir. 1969), *on certification*, 235 So. 2d 482 (Fla. 1970), *on receipt of answers following certification*, 430 F. 2d 828 (5th Cir. 1970), the question was whether an employer may be liable for indemnity to a third party who has been sued by the injured employee where the negligence of the employer who has paid workmen's compensation is alleged to be primary. That question was certified to the Florida Supreme Court because there were "no guidelines under existing Florida jurisprudence to assist us in making a determination, and since our interpretation of the exclusive remedy provision of the Florida Workmen's Compensation Act would have a significant state-wide impact." 409 F. 2d at 1061.

In addition to the Fifth Circuit, other circuit courts of appeals have utilized available state certification procedures. For example, *Walko Corp.* v. *Burger Chef Systems, Inc.*, 554 F. 2d 1165 (D.C. Cir. 1977), *on certification*, 378 A. 2d 1100 (Md. 1977), *on receipt of answers following certification*, 568 F. 2d 1389 (D.C. Cir. 1977), certified to the Court of Appeals of Maryland whether the pendency of an unsuccessful motion to intervene tolled the running of the statute of limitations. The court there observed that fortunately Maryland had enacted the Uniform Certification of Questions of Law Act and that "by utilizing it we may avoid the hazards inherent in any attempt to forecast how the Maryland courts might rule by the simple expedient of affording the Maryland Court of Appeals an opportunity to address the question." 554 F. 2d at 1173.

Bellotte v. *Zayre Corp.*, 531 F. 2d 1100 (1st Cir. 1976), *on certification*, 352 A. 2d 723 (N. H. 1976), certified to the Supreme Court of New Hampshire whether the term "unreasonably dangerous" as applied in a products liability case had reference to the child user rather than to the purchasing parent. Earlier, the First Circuit had invoked Rhode Island's certification procedure, *D'Ambra* v. *United States*, 518 F. 2d 275 (1st Cir. 1975), *on certification*, 338 A. 2d 524 (R.I. 1975) (right of mother who witnessed child's death to sue for negligent infliction of emotional distress), and Maine's certification procedure, *Hiram Ricker & Sons* v. *Students International Meditation Society*, 501 F. 2d 550 (1st Cir. 1974), *on certification*, 342 A. 2d 262 (Me. 1975) (failure to comply with Maine licensing statute as bar to recovery based upon the performance of services for which licenses were required).

A situation analogous to that presented here arose in *Gabhart* v. *Gabhart*, 545 F. 2d 877 (7th Cir. 1977), *on certification*, 370 N. E. 2d 345 (Ind. 1977). Stating that there

existed "important questions of first impression under Indiana corporation law," the Seventh Circuit certified the question whether a minority shareholder's only right in a merger is to the fair value of his shares if the only purpose is to squeeze him out. That issue was regarded as "an important question requiring interpretation of state statutes and state corporation policy which, in view of the certification procedure made available to us by Rule 15(N) of the Indiana Supreme Court should be answered by that court as the authoritative and final arbiter of state law." 545 F. 2d at 881.

Oklahoma's certification procedure was utilized by the Tenth Circuit in *Krutsinger* v. *Mead Foods, Inc.*, 546 F. 2d 328 (10th Cir. 1976), *on certification*, 560 P. 2d 195 (Okla. 1977), an action alleging price maintenance in violation of the anti-trust laws. At issue was whether under Oklahoma law a price maintenance contract had to be a formal written agreement to be entitled to the exemption from the anti-trust laws granted by the Miller-Tydings Amendment to the Sherman Act in the case of price maintenance contracts authorized under state law. Because the state of the law in Oklahoma and nationally was far from definitive, the court certified that question to the Oklahoma Supreme Court.[13]

The present case raises important issues of state law having a substantial impact beyond this case which are of particular significance to Kentucky because they involve

[13]The Uniform Certification of Questions of Law Act, upon which Kentucky's certification procedure was based, was approved by the National Conference of Commissioners of Uniform State Laws and the American Bar Association in 1967. 12 U.L.A., *Uniform Certification of Questions of Law Act*, p. 49 (1975). The Act has also been adopted by Colorado, Florida, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, North Dakota, Oklahoma, Rhode Island, Washington, and West Virginia. *Id.* 1979 Supplement, p. 11. From the foregoing cases it can be seen that certification procedures have also been adopted in Alabama, Louisiana, Georgia, and Indiana.

sensitive policy choices to be made by Kentucky affecting the administration of its workmen's compensation law. Many other circuit courts of appeals undoubtedly would have certified these issues to the Supreme Court of Kentucky had this case arisen there. The conflicting views with respect to this important policy of federal judicial administration inherent in the failure of the court of appeals to invoke certification is a matter peculiarly appropriate for resolution by this Court.

III. The Court of Appeals Erroneously Determined an Important Question of State Law Under Kentucky's Workmen's Compensation Act in Violation of the Duty Imposed Upon It by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

Obedient to its duty under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the district court in this diversity case recognized that it could reach only the result which would be reached if the matter were before the Kentucky courts and that *Erie* precluded it "from altering the expressed policy determinations of the applicable state court of last resort" (App., 21a). The court of appeals, on the other hand, disregarded those restrictions imposed upon it by *Erie* which the district court had so carefully observed.

We, of course, recognize that this Court generally is "hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *United States* v. *Durham Lumber Co.*, 363 U. S. 522, 527 (1960). Deference is given the interpretation placed upon purely local law by federal judges of long experience in the jurisprudence of the state whose law is applied. *MacGregor* v. *State Mutual Co.*, 315 U. S. 280 (1942); *Helvering* v. *Stuart*, 317 U. S. 154 (1942), *as modified*, 317 U. S. 602 (1942). As was stated on direct

appeal in *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55 (1937), this Court is disposed to accept the construction given a state statute by a lower court "particularly when that court is composed * * * wholly of citizens of the state, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws." 300 U. S. at 74-5.

We submit, however, that the normal deference given to an interpretation of state law by the lower federal courts is not due the majority opinion. The only judge who considered this case having a background in Kentucky law was the district judge. The two judges who composed the majority in the court of appeals had no particular expertise in the issues of Kentucky law raised here but nevertheless seemingly gave no weight whatsoever to the district judge's view of Kentucky law. In fact, the author of the majority opinion is the newest member of the court of appeals, having been appointed October 31, 1977, from a state other than Kentucky. The concurring judge is a senior circuit judge from a state other than Kentucky. That no particular deference should be accorded the majority opinion under these circumstances is especially so since the federal judges who considered the case were evenly divided as to the proper interpretation of Kentucky's Workmen's Compensation Act.

More importantly, however, examination of the majority opinion discloses that the court of appeals was clearly wrong in at least three major respects in its interpretation and application of Kentucky law. First, the majority opinion erroneously concludes that courts liberally construe the coverage provisions of workmen's compensation acts but narrowly construe the immunity provisions (App., 6a, 7a). The universally accepted rule is that workmen's compensation statutes are to be liberally construed regardless of whether the injured party seeks to invoke the protection of those statutes or to deny coverage. The rule was cogently set forth in *Adams* v. *Ford Motor Co.*, 573 F. 2d 1182 (10th Cir. 1978):

> Another rule of construction here pertinent is that the Workmen's Compensation Act is to be liberally construed. The rule of liberal construction is most frequently invoked by employees who have suffered injury and are seeking their remedy under the Act. But no different rule of construction can be adopted where an injured workman for reasons which he regards sufficient seeks a remedy outside the Compensation Act.

573 F. 2d at 1185.

Similarly, in *Adamson* v. *Okland Construction Co.*, 508 P. 2d 805 (Utah 1973), the court states the rule:

> Fundamental standards of justice dictate that it would be inconsistent to apply the act liberally in favor of the injured workman in order to find coverage by one employer on a project, and then to reverse that policy and adopt a restrictive view to exclude coverage of another employer on the project so that a suit could be maintained against him.

508 P. 2d at 807.[14]

As a corollary, it is also uniformly held that one who is liable for workmen's compensation benefits is not liable in

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[14]Among the other decisions adhering to this principle are *Cole* v. *Chevron Chemical Company—Oronite Division*, 477 F. 2d 361, 365 (5th Cir. 1973), *cert. denied*, 414 U. S. 858, 978 (1973); *Arnold* v. *Shell Oil Co.*, 419 F. 2d 43, 47 (5th Cir. 1969); *Jackson* v. *Southern Pacific Co.*, 285 F. Supp. 388, 389 (D. Nev. 1968); *Woods* v. *Cessna Aircraft Co.*, 553 P. 2d 900, 902-03 (Kan. 1976); *Stubbs* v. *Green Brothers Gravel Co.*, 206 So. 2d 323, 325 (Miss. 1968); *Rutherford* v. *Modern Transportation Co.*, 320 A. 2d 522, 525-26 (N.J. Super. L. Div. 1974). *See* 101 C.J.S. *Workmen's Compensation* § 918 (1958).

tort. The quid pro quo for compensation liability is immunity from suit in tort. For example, in *Renfroe* v. *Higgins Rack Coating & Manufacturing Co.*, 169 N. W. 2d 326 (Mich. App. 1969), it is stated at pages 328-29: "Consequently, our inquiry must be whether the facts of this case would make defendant Higgins Co. liable to pay workmen's compensation benefits under the act. If the answer is yes, we must affirm the summary judgment denying the separate tort claim."

In *Liles* v. *Riblet Products of Louisiana, Inc.*, 363 F. Supp. 358 (W.D. La. 1973), *aff'd*, 509 F. 2d 804 (5th Cir. 1975), the court states:

> If plaintiff were seeking to hold defendants liable here for workmen's compensation under the provisions of § 1061, it is clear he would succeed * * * Under the jurisprudence of Louisiana, the mere fact that defendants are asserting this protection under its Compensation Act in order to obtain immunity from plaintiff's tort action cannot effect a different result here.

363 F. Supp. at 365. *See also Woods* v. *Cessna Aircraft Co.*, 553 P. 2d 900 (Kan. 1976); *Coco* v. *Winston Industries*, 330 So. 2d 649 (La. App. 1975), *judgment set aside on other grounds*, 341 So. 2d 332 (La. 1976); 2A Larson's Workmen's Compensation Law ¶ 72.20 (1976).

The district court properly determined that application of the Act should not be approached on any different policy ground because the "employer" was asserting coverage, citing *Mahan* v. *Litton*, 321 S. W. 2d 243 (Ky. 1959). There, a helper employed, paid, and directed by a bottling company's route man sued the company for damages in tort, but the suit was dismissed because the helper's exclusive remedy was compensation under the Act. That the district court correctly analyzed *Mahan* is amply demonstrated by the following statements from that opinion:

> Wherever the Workmen's Compensation law is applicable, the rights and remedies granted or provided thereby are exclusive with certain exceptions which the statute makes. Hence, the right to maintain an action for damages for personal injuries and any corresponding liability of the employer to the employee for negligence of the employer, directly or under the doctrine of respondeat superior, are extinguished, and no common law action can be maintained to recover damages.
>
> * * *
>
> The question of the relationship of employer and employee has usually arisen in respect of liability or non-liability for tort and in claims for workmen's compensation. The test in the two categories is substantially the same. If there is any difference, it lies in the attitude of greater liberality in workmen's compensation cases to hold the relationship to exist than in cases of vicarious liability for tort.
>
> * * *
>
> In connection with these two aspects of the question of whether the plaintiff in this action is precluded from maintaining a common law action for damages, the appellant company submits analogous suppositious cases. It submits that if Litton, while carrying a heavy case of the beverage from the truck to the customer, had dropped it on his own foot, he would clearly have had the right to workmen's compensation; and the fact that he was receiving a part of the per-case payment to Mahan, the driver-salesman, would not have deprived him thereof. * * * The other illustrative case is that if Litton had dropped the case of bottles on the foot of a customer of the store into which he was carrying it, the company would be liable for his negligence. * * *
>
> We regard the analogies as apt. The same law and principle must be applied to the condition and circumstances of the case at bar.

321 S. W. 2d at 245-46.

That the majority labored under a total misapprehension as to the applicable Kentucky law is well illustrated by its treatment of and misleading quotation from the *Mahan* case in footnote six of the majority opinion (App., 7a). The majority simply ignores the effect of that decision and, in the process, places Kentucky in the position of being a minority of one, resting its entire decision on an unsound and unsupportable premise. The other decisions cited by the majority in footnote six of its opinion do not hold that the rule favoring coverage is inapplicable when immunity is the issue. Those decisions were decided under the Act as it existed prior to the extensive 1972 amendments and merely recognize that immunity should not be extended where to do so would violate the plain meaning of the Act.

The second major error in the majority's interpretation of Kentucky law is its conclusion that there was no contract between Petitioner and Scotia within the meaning of KRS 342.610 (notwithstanding that the district court found such a contract to exist). In so holding, the majority opinion totally disregards applicable Kentucky law and completely misreads the decision of the Kentucky Supreme Court in *Elkhorn-Hazard Coal Land Corp.* v. *Taylor,* 539 S. W. 2d 101 (Ky. 1976). *Elkhorn-Hazard* has been discussed in detail at pages 21-2 of this Petition, and we will not repeat that analysis here.

As is also more fully discussed at pages 23-5 of this Petition, the majority opinion does not even refer to the decision of Kentucky's intermediate appellate court in *Upper Elkhorn Coal Co.* v. *Thornberry,* 564 S. W. 2d 842 (Ky. App. 1977) (discretionary review denied by Kentucky Supreme Court on May 16, 1978), although the rationale of that case is determinative of the present case. Nor does the majority opinion refer to the decision of the Supreme Court of Kentucky in *United Engineers and Constructors, Inc.* v. *Branham,* 550 S. W. 2d 540 (Ky. 1977), which is most instructive as to what would be the attitude of the Kentucky court if faced with the issues presented here.

The third point upon which the majority opinion is clearly wrong lies in its conclusion that Petitioner was not an "employer" under the Act. In so deciding, the majority for the second time in its opinion adopts a double standard. In holding KRS 342.610 inapplicable, Petitioner and Scotia are said to be too close to contract notwithstanding the finding of the district court that a contract existed between them. However, on the question whether the relationship is such as to render Petitioner an "employer" within the meaning of the Act, the majority opinion completely ignores that reasoning and holds that they are too far apart. There is nothing in Kentucky law to indicate that Kentucky would adopt such an inconsistent and illogical line of reasoning.

Poyner v. *Lear Siegler, Inc.,* 542 F. 2d 955 (6th Cir. 1976), *cert. denied,* 430 U. S. 969 (1977), is cited by the majority on this point. That case involved a shareholder's liability for corporate debts as applied in the parent-subsidiary context. The majority opinion cites no Kentucky case indicating that Kentucky's attitude toward disregarding corporate entities for financial responsibility reasons applies with the same force in the workmen's compensation field. Cases from other jurisdictions recognize that in applying remedial legislation different considerations are involved than in the case of a common law action seeking to hold a shareholder liable for corporate torts or debts.

As was pointed out in *Eagle Star Insurance Co.* v. *Deal,* 474 F. 2d 1216, 1219 (8th Cir. 1973), the considerations pertinent to "piercing the corporate veil" for financial responsibility reasons and those relevant to determining

the employment relationship "are not identical and they are weighted differently in light of the distinct purposes to be resolved." In *United States* v. *Davison Fuel and Dock Co.*, 371 F. 2d 705 (4th Cir. 1967), an action to compel payment of wages to coal miners, the defendant, which had contracted to supply the coal but which operated no coal mines directly, and its wholly owned subsidiaries which operated the mines were held to be an integrated production structure for the purpose of enforcing the Walsh-Healey Act. Affiliated corporations having the same officers, business, and operating procedures or dividing responsibilities in operating a business have been held to constitute a single employer for purposes of enforcing the National Labor Relations Act. *N.L.R.B.* v. *Patterson Menhaden Corp.*, 389 F. 2d 701 (5th Cir. 1968); *N.L.R.B.* v. *Gass*, 377 F. 2d 438 (1st Cir. 1967). *See Seltzer* v. *Isaacson*, 371 A. 2d 304 (N.J. Sup. Ct. 1977) (employee limited to one recovery where a unitary employer-entity exists in substance, whether or not technically).

Moreover, the majority opinion acknowledges that Scotia performed mining work for Petitioner. That being true, and assuming that Petitioner and Scotia are separate entities and that KRS 342.610 does not apply, then Scotia had to be acting as agent or servant for Petitioner. The majority in fact cites section 213 of the Restatement (Second) of Agency in concluding that Petitioner should be liable for harm resulting from its own negligent or reckless conduct (App., 15a). That section governs the liability of a principal conducting an activity through servants or other agents. Under Kentucky law, the employees of the servant or agent become the employees of the master or principal and cannot maintain a common law action for injuries arising out of their employment. *King* v. *Shelby Rural*

Electric Cooperative Corp., 502 S. W. 2d 659 (Ky. 1973), *cert. denied*, 417 U. S. 932 (1974); *Mahan* v. *Litton*, 321 S. W. 2d 243 (Ky. 1959). *See* KRS 342.640.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be granted and the judgment of the Court of Appeals for the Sixth Circuit reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-1724

JENNIFER BOGGS, CAROL COMBS, GERALDINE COOTS, VERA GALLOWAY, LIBBY GIBBS, MADONNA GRIFFITH, DIANE MCKNIGHT, PHYLLIS PEAVY, VICKIE SCOTT, CELINDA SPARKMAN, ETHEL STURGILL, DEBBIE TURNER, REDA TURNER, and CHARLOTTE WIDNER, Administratrices of their decedents and individually - *Plaintiffs-Appellants*

v.

BLUE DIAMOND COAL COMPANY - - *Defendant-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed January 23, 1979

Before: MERRITT, Circuit Judge; CECIL and PECK, Senior Circuit Judges.

MERRITT, Circuit Judge, delivered the opinion of the Court, in which CECIL, Senior Circuit Judge, joined. PECK, Senior Circuit Judge, (pp. 15-16) filed a separate dissenting opinion.

In this diversity case, fifteen widows of coal miners killed in a mine disaster appeal the District Court's dismissal of their wrongful death action. The miners worked for a subsidiary corporation owned by the defendant, the

parent corporation. Plaintiffs allege acts of negligence of the parent corporation separate and distinct from the conduct of the subsidiary. The case raises serious questions of first impression under Kentucky's Workmen's Compensation Act.

The Act, like other workmen's compensation laws, grants immunity from common law negligence to an "employer" covered by the Act and to "contractors" who provide certain types of services to an "employer." The immunity is given in exchange for the guaranteed insurance benefits payable to injured employees without regard to fault.[1] The principal issue is whether the parent is an "employer" or "contractor" immunized from tort liability under these provisions.

Finding an implied contract for the subsidiary to mine coal for the parent, the District Court concluded that the parent was a "contractor" exempt from tort liability under Kentucky's Workmen's Compensation Act. We hold that the parent should not be characterized as either a "contractor" or an "employer" under the Act. We reverse the District Court's judgment and remand the case for trial.

I.

On March 9, 1976, fifteen coal miners were killed when methane gas exploded in Scotia Mine No. 1 at Oven Fork in

[1] Ky. Rev. Stat. Ann. § 342.690 (1978), the immunity section, provides:

> [T]he liability . . . under this chapter shall be exclusive and in place of all other liability of such employer to the employee . . . For purposes of this section, the term "employer" shall include a "contractor" covered by subsection (2) of KRS 342.610 . . . The exemption from liability given an employer by this section shall also extend to such employer's carrier and to all employes, officers or directors of such employer or carrier . . . .

§ 342.610(2) defines "contractor" as:

> a person who contracts with another (a) to have work performed consisting of the removal . . . of . . . minerals . . . or (b) to have work performed of a kind which is a regular . . . part of the work of the . . . business . . . of such person . . . .

Letcher County, Kentucky. The Scotia Mine is owned and operated by Scotia Coal Company, a wholly owned subsidiary of Blue Diamond Coal Company, whose offices and principal place of business are located in Knoxville.

Blue Diamond operates several coal mines and related businesses. It describes itself in its brief as a multi-unit enterprise consisting of a group of wholly owned subsidiary corporations controlled by a central holding company:

> Blue Diamond enters into sales contracts based upon coal to be produced from the mines of its wholly owned subsidiaries. . . . All coal produced by Scotia is sold by Blue Diamond and shipped as directed by Blue Diamond. Sales are invoiced to customers by Blue Diamond and deposited in its bank accounts. A sale of coal from Scotia is entered as a credit to Scotia on the accounting records, *but all money is retained by Blue Diamond and is used as it chooses.* Funds needed to pay expenses at Scotia are furnished by Blue Diamond with an appropriate entry in the intercompany accounts. (Emphasis added.)

The District Court found that within this corporate arrangement the management of Blue Diamond, the parent, had the primary responsibility for "mine safety functions" at the Scotia mine.

Simply stated, the theory of plaintiffs' case is this: Blue Diamond provided management, engineering and safety services to Scotia, including advice and assistance in mine ventilation. Blue Diamond's management recognized that improvements in the ventilation of the Scotia Mine were needed in order to minimize the accumulation of methane gas but negligently delayed construction of these improvements. Blue Diamond authorized removal

of existing ventilation and safety devices in order to open a new tunnel of the mine but concealed the changes from federal mine inspectors who would have taken immediate steps to correct the dangerous condition or to close the mine had they known of the changes. The ventilation changes increased the methane gas in the existing tunnel and caused the explosion. Blue Diamond recklessly created a dangerous situation and put the miners' lives at risk in order to increase its profits in a rising market.

The parent corporation moved for summary judgment claiming immunity from tort under the Kentucky's Workmen's Compensation Act on the ground that the parent and subsidiary produce coal as part of an integrated business and should be considered a joint or single "employer." The parent argued, in the alternative, that the subsidiary produces coal for it under an agreement and that the parent should be considered a "contractor" expressly exempt from common law liability under the Act.[2]

At the close of plaintiff's case after three days of testimony before a jury, the parent moved for a directed verdict and also renewed its motion for summary judgment. The District Judge sustained its motion for summary judgment. He concluded that the "undisputed course of conduct" evidenced an implied contract "from 1962 to date" for the subsidiary to mine coal for the parent. The parent, he held, should be deemed a "contractor" exempt from common law liability. On this appeal we must decide the extent to which workmen's compensation laws abrogate the common law liabilities of a parent corporation or holding company for injuries to its subsidiary's employees.

II.

Workmen's compensation laws were passed before the multi-unit enterprise became the norm in the American

[2]The relevant language of the Act is quoted in note 1, *supra*.

economy and before the accompanying managerial revolution in American business. *See* Chandler, *The Visible Hand* 377-498 (1977): For this reason, state workmen's compensation laws, including Kentucky's Workmen's Compensation Act, do not address the question of a parent corporation's immunity from common law tort liability for injuries to its subsidiary's employers, [sic] nor does the Kentucky case law interpreting the Act. Few cases from other jurisdictions touch upon the question, and the general legal literature in the field does not deal with it. In the absence of controlling authority, we look to the language of the Act, its history and purpose, and the general concepts underlying workmen's compensation laws in order to find a sound approach to the problem.

The dominant purpose of the movement to adopt workmen's compensation laws in the early decades of this century was *not* to abrogate existing common law remedies for the protection of workmen. It was to provide social insurance to compensate victims of industrial accidents because it was widely believed that the limited rights of recovery available under the common law at the turn of the century were inadequate to protect them.

The so-called "unholy trinity" of judicially-created employer defenses, assumption of the risk, contributory negligence and the fellow servant rule, were developed and strictly enforced as legal rules in the last half of the nineteenth century. The result, according to Deans Prosser and Wade, was recovery in less than a quarter of work-related accidents, as injured workmen subsidized economic growth.[3]

[3]Prosser & Wade, *Cases and Materials on Torts* 619 (5th ed. 1971); Prosser, *Handbook of the Law of Torts* § 80 (1971). *See* Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L. Q. 206 (1952). *See also* HOROWITZ, *The Transformation of American Law* 251-66 (1977); Pound, *The Spirit of the Common Law* 29-31, 47 (1921).

Employers generally opposed the movement for "reform"; labor generally favored it. Workmen's compensation laws were adopted as a compromise between these contending forces. Workmen were willing to exchange a set of common-law remedies of dubious value for modest workmen's compensation benefits schedules designed to keep the injured workman and his family from destitution.

Since the adoption of workmen's compensation laws, common law tort principles have been modified gradually. Liability has expanded. The defenses of contributory negligence, assumption of the risk and the fellow servant rule have been narrowed or abolished. But workmen's compensation benefits have remained low, and the compromise which extended immunity from common-law liability to employers has remained in place.

Congress, responding to rising public consciousness of the need for occupational safety, has viewed the safety incentives provided by existing laws as inadequate. It has enacted new regulatory arrangements to insure more safety at mines[4] and at work places generally.[5]

Courts have responded by liberally construing the coverage provisions of workmen's compensation acts while narrowly construing the immunity provisions. Judge Celebrezze, writing for this Court, described the developments of Kentucky case law in this direction in *Bryant* v. *Old Republic Insurance Co.*, 431 F. 2d 1385 (6th Cir. 1970), a case which held that an employer's workmen's compensation

[4]Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801 *et seq., as amended* by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-78.

[5]See the Occupational Safety and Health Act of 1970, 29 U.S.C. 651-78, including § 27 in which Congress "finds and declares" that "in recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of . . . new risks to health and safety, and increases in the general level of wages and the cost of living." 29 U.S.C. § 676.

insurance carrier is not an "employer" for purposes of the tort immunity provisions of the Act:

> A review of the Kentucky constitution . . . reveals that the personal representatives of an estate have a constitutionally protected right to recover for wrongful death, "unless otherwise provided by law." Constitution of Kentucky § 241 . The General Assembly of Kentucky subsequently codified this constitutional right. . . . The Workmen's Compensation Act is an express exception to Kentucky's constitutional and statutory right . . . .
>
> . . . .
>
> [T]he Kentucky Court of Appeals seems to be narrowing the concept of employer's immunity under its workmen's compensation laws and *in the absence of any compelling statutory language or social policy justification* . . . we believe that Kentucky Courts will preserve that State's constitutional and statutory right . . . . (Emphasis added.)

431 F. 2d at 1387-88.

Kentucky courts have given the "liberal" construction required by the express language of the Act by broadly construing the coverage provisions of the Act and narrowly construing the immunity provisions.[6]

Professor Arthur Larson, a leading authority in the field, justifies this approach for the following reasons:

[6]*See* Ky. Rev. Stat. § 342.004 (1978); *Bright* v. *Reynolds Metals Co.*, 490 S. W. 2d 474 (Ky. 1973); *Peters* v. *Radcliff Ready Mix, Inc.*, 412 S. W. 2d 854 (1967); *Cove Fork Coal Co.* v. *Newcomb*, 343 S. W. 2d 838 (Ky. 1961); *Mahan* v. *Litton*, 321 S. W. 2d 243, 245 (Ky. 1959) (case appears to say that the "test" of the "relationship of employer and employee" is "substantially the same" under the Act, but courts have adopted an "attitude of greater liberality in . . . compensation cases . . . than in cases . . . for tort").

> [T]here is no strong reason of compensation policy for destroying common law rights . . . [and] *every presumption should be on the side of preserving those rights,* once basic compensation protection has been assured . . . . The injured employee has a right to be made whole — not just partly whole. . . . [A]ll the reasons for making the wrongdoer bear the costs of his wrongdoings still apply, including the moral rightness of this result as well as the salutary effect it tends to have as an incentive to careful conduct and safe work practices. (Emphasis added.)

2A Larson, *The Law of Workmen's Compensation* ¶ 72.50 at 14-95 (1976).

In light of this history and policy, we agree that "every presumption should be on the side of preserving" common law rights in the absence of "compelling statutory language or social policy justification." We approach the problem from this perspective.

III.

1. *"Contractor" Immunity.* — The District Court concluded that the parent is a "contractor" for the mining services of its subsidiary and hence immune under the "contractor" provision of the Act. The Act provides that a "contractor" shall be deemed an "employer" under the Act. For purposes of this case, a "contractor" is one who (a) "contracts with another" (b) "to have [mining] work performed."[7] There is no question that the subsidiary performed mining work for the parent; the only question is whether the parent performed the work under a "contract" with the subsidiary.

In its brief on appeal, Blue Diamond argues first that there was an "implied contract" between the parties based

[7] *See* note 1, *supra.*

upon their conduct; and second, even if there were no contract "in the technical sense" of "a formal, enforceable" agreement, the contractor provision requires only a "functional relationship by which one person" mines coal for another.

In the only case to date defining its scope, Kentucky's highest court read the "contractor" provision narrowly, even for the purpose of determining compensation coverage under the Act. It held that a mining company employee could not recover workmen's compensation from a separate company that had leased coal land to his employer. *Elkhorn-Hazard Coal Land Corp.* v. *Taylor,* 539 S. W. 2d 101, 103 (Ky. 1976). The court described the contractor provision as "limited in application," limited to "persons who *contract* with another." Its legislative purpose was to "discourage owners and contractors from hiring financially irresponsible contractors and subcontractors" in order to avoid coverage under the Act.

This language, as well as the language of the statute itself, appears to contemplate a regular, enforceable contract between "independent" parties dealing with each other at arm's length. Here, there is no formal, integrated agreement, either written or oral. If we view the course of conduct of the parties as creating a "contract implied in fact" from the conduct of the parties, as did the District Court, it is unclear what the terms of the contract are, what mutual promises were made, what consideration was given, what the duration of the contract is, or what contractual obligations or expectations were created.

The principle of reciprocity or mutuality of obligation is the very essence of contract. Here it is missing. As Blue Diamond says in its brief, "all money is retained by Blue Diamond and is used as it chooses." Kentucky courts have declined to characterize and enforce such arrangements as

"contracts" under Kentucky law, finding that they are so one-sided and unspecific as to be "illusory" and "lacking in mutuality." *See Baber* v. *Lay*, 305 S. W. 2d 912 (Ky. 1957).

This does not end the matter, however. Blue Diamond stresses its second point that the Act does not require a specific contract "in the technical sense." It argues that the parent should be immune as a "contractor" if the realities of the situation create a "functional relationship" sufficiently like a contractual relationship to come within the purposes of the Act.

This argument does not strengthen Blue Diamond's position. Even if we were willing to stretch the point and dispense with the need for an actual contract, the relationship between the parties under such a reading of the contractor provision should at least fit within basic contract theory. Here it does not fit.

Contract theory either does not recognize, or characterizes as voidable, arrangements between parties who lack adequate bargaining power. *Restatement of Contracts*, Chaps. 1-2 (1933). A number of contract doctrines render ineffective arrangements where one party is subject to coercion or where there is no real exchange. For example, contract theory has not viewed the relationship between parent and child as contractual, and children and others without real bargaining power do not have the capacity to contract. The doctrines of duress, undue influence and unconscionability are based on similar considerations. *Id.* at Chaps. 15-18. The doctrine of consideration itself requires a real exchange between autonomous parties. *Id.* at §§ 6, 75-84. The doctrines of fraud and mistake presuppose a meeting of the minds between real parties with freedom to deal at arm's length. *Id.* at Chaps. 15, 17. Contract obligations are enforceable as a matter of "right," and contract

theory is based on the intention of parties who possess the freedom to agree or disagree.[8]

These various contract doctrines suggest that the "functional relationship" between a parent and a subsidiary is not a contractual relationship. The expectations of the parties are not based on mutual promises, consideration or consent, for one party owns and has custody of the other party. The relationship between parent and subsidiary is based upon the status of the parties and is more like the relationship between parent and child, warden and prisoner, and other similar relationships. The relationship is not based upon the bargaining power of the parties.

We arrive at the same conclusion if we analyze the question in terms of the basic theory of corporation law. The business firm is a method, "alternative to contracting," of organizing economic production whereby performance is predicated upon the control inherent in share ownership rather than upon the terms of a contract. Posner, *Economic Analysis of Law* 174-89 (1973). The "essence" of the contract method is that "the entrepeneur negotiates . . . an agreement specifying the price, quantity, quality, due date, credit terms, etc., of the contractor's performance." In the corporate context, on the other hand, the parent "directs the performance" of the subordinate units. *Id.* at 174.

Consequently, we do not believe that the relationship here is contractual either in fact or in theory. The parent should not be characterized as a "contractor" for the mining services of its wholly owned subsidiary for purposes of the tort immunity provisions of the Act.

2. *Employer's Immunity.* — Kentucky courts have not addressed the question of whether a multi-unit corporate enterprise should be viewed as a single "employer" for

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[8] *See generally*, Corbin, *Contracts*, Chaps. 1, 4, 6 (1963); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1725-37 (1976).

purposes of liability and benefits under the workmen's compensation statute. But Kentucky recognizes customary principles of corporation law which hold that separate corporate identities should not be disregarded. *Square D. Co.* v. *Kentucky Bd. of Tax Appeals,* 415 S. W. 2d 594, 601 (1957). Owners may elect to divide their business into parent and subsidiary corporations entitled to respect as separate legal entities in the absence of improper purposes. To remove that right and the reciprocal obligations it imposes would violate general principles of Kentucky law. For example, in *Poyner* v. *Lear Sielger,* [sic] *Inc.,* 542 F. 2d 955 (6th Cir. 1976), the plaintiffs sought to hold a corporation liable for the obligations of its subsidiary. Applying "the law as it appears in existing Kentucky decisions," this court declined to disregard the corporate fiction, observing that "the approach of the Kentucky Courts to piercing the corporate veil has been described as evincing 'a general aversion for any disregard of the corporate entity.' " *Id.* at 958. We noted "it would be an unprecedented extension of the Kentucky doctrine to disregard [the subsidiary's] separate corporate existence." *Id.* at 961.

Whatever the semantics, it is unusual to find the parent corporation arguing that the corporate "fiction" should be disregarded, or that the "corporate veil" should be "pierced." The separate artificial corporate personalities are usually disregarded only when the corporate device is used to defraud creditors, create a monopoly, circumvent a statute or for other similar reasons. Berle, *The Theory of Enterprise Entity,* 47 Colum. L. Rev. 343 (1947); Fuller, *The Incorporated Individual,* 51 Harv. L. Rev. 1373, 1401 (1938).

Under similar facts, other jurisdictions have declined to disregard the corporate entities at the request of the parent corporation. In *Latham* v. *Technar, Inc.,* 340 F. Supp. 1031

(E.D. Tenn. 1974), Judge Taylor held that the administrator of the estate of a deceased employee of a wholly owned subsidiary could sue the parent for its negligence in causing the death of the employee. The parent contended that plaintiff's sole remedy was workmen's compensation benefits. The court held, however, that the plaintiff could maintain a common law wrongful death action against the parent as a third party. Similarly, in *Oliver* v. *St. Clair Metal Products Co.,* 45 Mich. App. 242, 206 N.E. 2d 444 (1973), an injured employee sued the parent of his employer corporation as a third party claiming that negligence by the employees of the parent had caused his work-related injury. The court held that the suit could be maintained. Each of the parent's plants were separately incorporated as subsidiaries. The evidence showed that a management official of the parent corporation who was in charge of supervising production at various plants had become aware of the lack of safety features on a machine operated by plaintiff.[9]

These cases are based on the traditional view that a business enterprise has a range of choice in controlling its own corporate structure. But reciprocal obligations arise as a result of the choice it makes. The owners may take advantage of the benefits of dividing the business into separate corporate parts, but principles of reciprocity require that courts also recognize the separate identities of the enterprises when sued by an injured employee. *See* Fletcher, *Fairness and Utility in Tort Theory,* 85 Harv. L. Rev. 537 (1972).

The increasing concentration of discrete business entities in the hands of holding companies, regional, national and international, has a more subtle influence on the ques-

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[9]*See also Wheeler* v. *New York, New Hampshire and Hartford Railroad,* 157 A. 159 (Conn. 1931); *Foley* v. *New York City Omnibus Corp.,* 112 N.Y.S. 2d 217 (1952); *Phillips* v. *Stowe Mills, Inc.,* 167 S.E. 2d 817 (N.C. 1969); *Brown* v. *Morehead Oil Co.,* 124 S.E. 2d 47 (S.C. 1962).

tion raised in these cases. Implicit in these decisions is the suggestion that the tort system should not deny recovery in an increasingly concentrated economy to an injured employee due to the fortuitous circumstance that the tortfeasor is not a stranger but is controlled by the same business enterprise that controls his immediate employer. *See* Davis, *Workmen's Compensation — Using an Enterprise Theory of Employment to Determine Who is a Third Party Tort-Feasor,* 32 Pitt. L. Rev. 289, 294 (1971).

We conclude that Blue Diamond should not be allowed to avoid the consequences of its corporate structure in order to claim immunity from customary tort liability under Kentucky's workmen's compensation statute. The District Court properly concluded "that Blue Diamond and Scotia are separate and distinct corporations" and properly rejected Blue Diamond's argument that the two corporations should be treated as one.[10]

[10]In the case of *Bryant* v. *Old Republic Insurance Co.*, discussed at pages 6-7, *supra*, the insurance carrier was negligent in failing properly to carry out its duty to inspect its insured's coal mine. After the *Bryant* decision, the Kentucky legislature amended the Workmen's Compensation Act to give the carrier immunity from tort liability as an "employer." *See* note 1, *supra*, and Ky. Rev. Stat. §§ 342.690(1) 342.620(4) and 342.620(5). In its third alternative argument, Blue Diamond contends in this case that it is also a "carrier" under these provisions and therefore exempt from tort liability because it acts jointly with Scotia as a self-insuror for that portion of their workmen's compensation obligation which they do not insure through insurance companies. This argument fails because the definitions of "carrier" and "self-insuror" exempt a self-insuror from tort liability only in connection with his own employees, K.R.S. § 342.620(5), and we have held that Blue Diamond is not an "employer" of Scotia's miners for purposes of the Act. Moreover, the negligence alleged against Blue Diamond did not arise from conduct or duties undertaken by Blue Diamond in its capacity as a workmen's compensation insurance carrier. Blue Diamond's fourth alternative argument that it should be exempt from common law liability because it is engaged in a "joint venture" with Scotia is also without merit for the reasons set forth in Judge Sneed's opinion in *House* v. *Mine Safety Appliances Co.*, 573 F. 2d 609, 619-21 (9th Cir. 1978). We do not reach Blue Diamond's fifth alternative argument that plaintiffs failed to establish the proximate cause of the explosion, and that the District Court should have granted Blue Diamond's motion for directed verdict on these grounds at the end of plaintiff's proof. The District Court has not ruled on this question, and we do not believe consideration of this question at this time is proper.

IV

For these reasons, we conclude that under Kentucky's Workmen's Compensation Act a parent is not immune from tort liability to its subsidiary employees for its own, independent acts of negligence. The parent should be liable under customary principles of the common law for harm resulting from its own negligent or reckless conduct. *See* Restatement (Second) of Agency § 213 (1958).

This is not derivative liability. The parent is not liable under the doctrine of *respondeat superior* for the negligence of the subsidiary. *Id.* at § 217. For purposes of the doctrine of *respondeat superior,* a subsidiary which provides workmen's compensation should be treated as having terminated the derivative liability of its parent or principal by satisfaction of the claim. *Id.* at §§ 185, 217. But neither these rules of agency nor the workmen's compensation law insulate the parent from tort liability for its independent acts of negligence which cause injury to its subsidiary's employees.

Accordingly, the judgment of the District Court is reversed and the case is remanded for trial.

PECK, Senior Circuit Judge, dissenting. Most respectfully, I feel required to dissent from the majority opinion in what is to me a particularly disturbing case.

As a point of departure, I am not in disagreement with the conclusion expressed in the majority opinion to the effect that the coverage provisions of Workmen's Compensation acts should be liberally construed, but that their immunity provisions should be narrowly construed. *See, Bryant* v. *Old Republic Insurance Co.*, 431 F. 2d 1385 (6th Cir. 1970). However, I have definite reservations concerning the majority's finding support for such construction in what it concludes to be the inadequacy of the dollar compensation paid under the requirements of the Kentucky

Act. Any such inadequacy as may exist must be the subject of legislative, not judicial, readjustment. And with all due respect, I do not find the scholarly writings of experts in the field persuasive, and in any event not controlling, in the light of the fact that the fundamental philosophy of Workmen's Compensation acts is that remuneration be provided on a no-fault basis in return for employers' immunity from common law liability.

My concern arises from the fact that in a long and thoughtful Memorandum Opinion, Judge Hermansdorfer correctly stated the factual prerequisites for a finding of immunity under the Act, and went on to find that each was satisfied under the circumstances of this case. I can find no reason to hold the following finding of fact made by Judge Hermansdorfer clearly erroneous: "The undisputed course of conduct between Blue Diamond and Scotia, considered as contracting parties, is clear. The intent of the parties as to their respective functions in the Oven Fork, Kentucky mining operation and the consideration to be exchanged between them are beyond doubt. *I find a contract to exist between the parties from 1962 to date.*" It seems to me to be no accident that Judge Hermansdorfer used the word "find," since it appears clear that the requisite determinations constitute findings of fact. The question of the existence of an implied contract is certainly the sort of issue which, in an appropriate case, would be submitted to a jury.

The majority opinion proceeds through the litany of the requirements of a formal contract, and without difficulty demonstrates that they are not all to be found in the circumstances giving rise to the present litigation. However, it is clear that no such formal contract is required in order to provide immunity. For example, in *Upper Elkhorn Coal Co.* v. *Thornberry*, Ky. App., 564 S. W. 2d 843 (1977), the Coal Company was being sued for Workmen's Compensa-

tion benefits. The Company argued that it was not a contractor under the Act, and thus not liable for benefits. A partnership owned the lease for the coal fields, and had contracted with the decedent's employer to produce coal and deliver it to Upper Elkhorn. Despite the fact that there was no contract at all with Upper Elkhorn, much less a "formal" one, the court held that the company was liable for benefits under the Act as a "contractor" because the two partners were acting for the benefit of Upper Elkhorn. It noted that the purpose of the arrangement was to secure production for Elkhorn, and that the benefit of all coal production fell to Upper Elkhorn. Similarly, in this case, there may not be a formal contract, but there is certainly an "arrangement," through which Blue Diamond obtains the benefit of the production of coal. It is worth emphasizing, too, that the majority's decision means that a parent company *cannot* be held liable for Workmen's Compensation benefits owed to the employees of its subsidiary. While that result may be attractive in the present case, in the long run such a conclusion may well have more unfortunate than beneficial effects.

I would affirm the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 77-1724

JENNIFER BOGGS, CAROL COMBS, GERALDINE COOTS, VERA GALLOWAY, LIBBY GIBBS, MADONNA GRIFFITH, DIANE MCKNIGHT, PHYLLIS PEAVY, VICKIE SCOTT, CELINDA SPARKMAN, ETHEL STURGILL, DEBBIE TURNER, REDA TURNER, and CHARLOTTE WIDNER, Administratrices of the decedents and individually, - *Plaintiffs-Appellants,*

v.

BLUE DIAMOND COAL COMPANY, - *Defendant-Appellee.*

Before: MERRITT, Circuit Judge; CECIL and PECK, Senior Circuit Judges.

JUDGMENT—Filed January 23, 1979

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded for trial.

It is further ordered that Plaintiffs-Appellants recover from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.
(s) John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 77-1724

JENNIFER BOGGS, et al., - - *Plaintiffs-Appellants*

v.

BLUE DIAMOND COAL COMPANY - *Defendant-Appellee*

ORDER—Filed March 9, 1979

Before: MERRITT, Circuit Judge; CECIL and PECK, Senior Circuit Judges.

A majority of the Court having not voted in favor of an *en banc* rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman, Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 77-69

JENNIFER BOGGS, Individually and as Administratrix of the Estate of Dennis Clay Boggs, Et Al. - - - - - - - - *Plaintiffs*

v.

BLUE DIAMOND COAL COMPANY - - - *Defendant*

MEMORANDUM OPINION—Filed September 21, 1977

This case involves a common law tort action for wrongful deaths brought by the widows as personal representatives of the estates of the fifteen coal miners who lost their lives in the Scotia mine disaster at Oven Fork, Kentucky on March 9, 1976. The deceased coal miners were employees of the Scotia Coal Company [Scotia], a wholly owned subsidiary of the defendant Blue Diamond Coal Company [Blue Diamond].

Jurisdiction is found under 28 U.S.C. §1332(a).

After plaintiffs filed their complaint and before trial, Blue Diamond filed a motion for summary judgment under Rule 56, F.R.C.P. The issue was extensively briefed but was not argued until after the close of plaintiffs case in chief in the tort action. The deferral of consideration was based in part, upon the teaching of *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256-257 (1948). Upon the conclusion of plaintiffs' evidence before the jury and after lengthy argument I determined that an adequate record on the summary

judgment motion was present for judicial review. Upon a consideration of the matters filed in support of the motion for summary judgment and opposing it, the pleadings and the plaintiffs' evidence, I orally granted defendant's motion on September 12, 1977.

This Memorandum Opinion will address the reasons for the granting of summary judgment in this case which, generally, cluster around two statutory provisions of the Kentucky Workmen's Compensation Act [Act] upon undisputed facts. I notice that during the argument neither side suggested there was an issue as to any material fact, and each party recognized in argument the consequences of the application of Kentucky Revised Statutes [KRS] 342.610(1) and 342.690. Each side argued upon the facts that it was entitled to the application of the two cited statutory sections. For plaintiff the legal result would be that Scotia was a contractor and Blue Diamond was a subcontractor and amenable to a tort action; for the defendant once contractor status under Section 342.610(2) would be attained the litigation would terminate since KRS 342.690 makes exclusive to plaintiffs the remedies of the compensation act.

Under *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938), this Court is authorized to reach only that result which would be forthcoming if the matter were tried in the Kentucky courts. The limitation of *Erie* proscribes federal courts from altering the expressed policy determinations of the applicable state court of last resort. Although there are appealing aspects to this case which, if presented to the Kentucky Supreme Court, might have prompted it to reconsider its announced views on the application of the Kentucky compensation law, such discretion belongs to the state's highest court and not to this Court.

I. Kentucky Workmen's Compensation Act

The Act was repealed by the Kentucky Legislature in 1972 and replaced with a revised Act [S. 184, 1972, eff. 1-1-73] which contains new provisions material to this action. In *Fields* v. *Twin City Drive-In,* Ky., 534 S. W. 2d 457, 458 (1976), the need to consider the new legislation in terms of the old was recognized.

This case is not a typical workmen's compensation action in which a person seeks to avoid liability under the Act to one claiming to be his employee, but rather presents the converse situation in which a person seeks to come within the ambit of the Act in the equivalent position of an employer and to benefit from the limitation of the Act's liability provisions.

Plaintiffs insist and defendant has agreed arguendo that Blue Diamond and Scotia are separate and distinct corporations. I am bound to accept this fact as true. Each party may assert it is entitled to the application of KRS 342.610(2).

The relevant portions of the texts of KRS 342.610(2) and KRS 342.690 provide:

"342.610. Liability for compensation.

"(1) Every employer subject to this chapter shall be liable for compensation for injury, occupational disease, or death without regard to fault as a cause of the injury, occupational disease, or death.

"(2) A contractor who subcontracts all or any part of a contract and his carrier shall be liable for the payment of compensation to the employes of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter. Any contractor or his carrier who shall become

liable for such compensation may recover the amount of such compensation paid and necessary expenses from the subcontractor primarily liable therefor. A person who contracts with another (a) to have work performed consisting of the removal, excavation or drilling of soil, rock or mineral, or the cutting or removal of timber from land, or (b) to have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation or profession of such person, shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.

"342.690. Exclusiveness of liability.

"(1) If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employe, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. For purposes of this section, the term 'employer' shall include a 'contractor' covered by subsection (2) of KRS 342.610, whether or not the subcontractor has in fact, secured the payment of compensation."

The provisions of KRS 342.610(2) have been interpreted in *Elkhorn-Hazard Coal Land Corporation* v. *Taylor,* Ky., 539 S. W. 2d 101 (1976), wherein a unanimous court by per curiam opinion noted that several states, including Kentucky, "have extended coverage to workers who are not actually employees of the person ultimately made liable for the payment of compensation awards," *Id.* at 103, by the legislative device of adopting provisions "by which a person

is *deemed* to be a contractor." *Id.* at 104 (Emphasis in original.) These provisions are limited in application to a person who contracts with another to have work performed for him in the two situations described in subparts (a) and (b) of the section. In the cited case an occupationally diseased employee of M & A Coal Company, the plaintiff-appellee Taylor, sought to extend coverage of the Act to the land company under this section. Coverage was denied upon the determination that M & A Coal Company was mining coal for itself and not for the land company which had no business of mining coal upon the record before the Court. This decision will be reviewed below in connection with the facts of the instant case.

In assessing Kentucky law as to whether or not application of the Act would be approached on any different policy ground because an "employer" was seeking coverage, I consider binding the case of *Mahan* v. *Litton*, Ky., 321 S. W. 2d 243, 245 (1959), where a youth employed by a route salesman was injured, and brought a common law tort action against the salesman's employer. The Court found the Act should have been applied and that the trial court was without jurisdiction to entertain the civil action. The Court wrote:

> "Wherever the Workmen's Compensation law is applicable, the rights and remedies granted or provided thereby are exclusive with certain exceptions which the statute makes. Hence, the right to maintain an action for damages for personal injuries and any corresponding liability of the employer to the employee for negligence of the employer, directly or under the doctrine of respondeat superior, are extinguished, and no common law action can be maintained to recover damages. [Citations omitted.]

> "The question of the relationship of employer and employee has usually arisen in respect of liability or nonliability for tort and in claims for workmen's compensation. The test in the two categories is substantially the same. If there is any difference, it lies in the attitude of greater liberality in workmen's compensation cases to hold the relationship to exist than in cases of vicarious liability for tort."

Accordingly, I conclude the Act should be applied without any particular policy sensitivity to the status of the persons involved or their respective roles in the employer-employee context.

I find any person must show in order to secure "contractor under" coverage of the Act, KRS 342.610(2), the following requisites: (1) A person must contract with another, (2) to perform work for him, (3) which involves the removal, excavation or drilling of mineral, or (4) which is a part of such person's regular or recurrent business or occupation which normally would be performed by such person's own employees.

II. MATERIAL FACTS

The history of Blue Diamond is set forth in the uncontroverted affidavit of Gordon Bonnyman, president and chief executive officer of Blue Diamond and president and chief executive officer of Scotia. [Record, Vol. III, Item 37.] Blue Diamond was incorporated in 1915 under a multiple purpose charter which included the authority to engage in the businesses of mining coal, dealing in coal properties and of buying and selling coal. Blue Diamond was incorporated for the primary purpose of operating Blue Diamond Mine No. 1 at Blue Diamond, Kentucky. [Bonnyman affidavit.]

Blue Diamond was in the business of coal mining for itself from its inception until December 4, 1974, when it turned over to its newly formed and wholly owned subsidiary, Blue Diamond Mining, Inc., its Leatherwood, Kentucky operation. The Leatherwood mine was the last mine directly operated by Blue Diamond for itself. [Bonnyman affidavit.]

In 1960 and 1961 Blue Diamond decided to form a new corporation, Scotia, to develop by mining some 12,589 acres of coal lands near Oven Fork, Kentucky which joined an additional 2,000 odd acres in the State of Virginia. Blue Diamond put together the properties and formed Scotia to mine them. [Bonnyman affidavit.]

Blue Diamond funded the opening of the Scotia mine.[1] [Bonnyman affidavit.]

Blue Diamond owns all of the outstanding stock of other operating companies, including Blue Diamond Mining, Inc., Stearns Mining Company, and Harris Mining Company. [Bonnyman affidavit.]

Blue Diamond exercises dominance in all mining decisions at Scotia, and maintains a corporate staff to discharge such technical functions. [Witnesses Jasper Cornett, Blue Diamond vice-president for mining operations; R. D. Cornwell, Blue Diamond general manager of mines.]

Blue Diamond takes all of the coal mined by Scotia and sells it on Blue Diamond invoices. Blue Diamond retains all monies received from the sale of coal returning to Scotia from general, comingled [sic] corporate funds such money as Scotia requires for its operation. Separate books are maintained for each corporation in the Blue Diamond family with Blue Diamond's management expenses being allocated on a tonnage basis to the several producing companies

[1]The evidence shows that three mines are operated at the same general site by Scotia. This case involves only the Imboden seam which is the deepest of such mines.

against the "debt" owed to each such company for tonnage produced. [Affidavit of Harmon McCarter, Blue Diamond treasurer and Scotia treasurer, Record, Vol. III, Item 38; testimony of Mr. McCarter at trial.]

III. ANALYSIS

The analysis will be upon a format controlled by the legal requirements of the Kentucky compensation law with the undisputed facts discussed thereunder.

A person must contract with another. Blue Diamond and Scotia have been shown to be persons under the Act. The parties admit in argument that in Kentucky an ascertainable course of conduct may be the basis for finding a contract implied in fact. *SEG Employees Credit Union* v. *Scott,* Ky., ____ S. W. 2d ____ (24 KLS 11, August 12, 1977) [554 S. W. 2d 402]; *Kellum* v. *Browning's Admr.,* Ky., 21 S. W. 2d 459, 465 (1929). The undisputed course of conduct between Blue Diamond and Scotia, considered as contracting parties, is clear. The intent of the parties as to their respective functions in the Oven Fork, Kentucky mining operation and the consideration to be exchanged between them are beyond doubt. I find a contract to exist between the parties from 1962 to date.

Plaintiffs argue the contract is unenforceable under the holding in *Baber* v. *Lay,* Ky., 305 S. W. 2d 912 (1957), where the Kentucky court found a total output contract for the sale and purchase of coal to be unenforceable in an action between the contracting parties. The contract was held to contain an illusory promise to purchase coal and, therefore, lacked mutuality. The decision, however, does not afford this Court a basis to hold the contract implied in fact between Blue Diamond and Scotia unenforceable. The contracting parties are not before this Court and, upon the entire record, neither of the parties to that contract is complaining about it.

To perform work for him. It is undisputed that at the inception of the arrangement between Blue Diamond and Scotia, it was a part of Blue Diamond's business to mine coal for itself. It also was part of Blue Diamond's business to mine coal for itself upon the effective date of the statute, January 1, 1973. Returning to the *Elkhorn-Hazard* decision, there the land company's lease income insulated it against economic loss by prospective decreases in the price of coal or from inefficient operations. The Court could find no evidence that the land company had a business of mining coal "or that it was conducting any work through the use of a lease . . . which normally would have been accomplished through the use of its own employees." 529 S. W. 2d at 104. Each of the factors identified by the *Elkhorn-Hazard* court as being factually material to application of the Act is satisfied by undisputed facts in the instant case.

Which involves the removal, excavation or drilling of mineral; or, which is a part of such person's regular or recurrent business or occupation. The uncontroverted facts show that in 1961 Scotia was formed to mine coal for Blue Diamond which at that time was engaged in direct coal mining. The work initially contracted to Scotia has been prosecuted and remains uncompleted.

IV. PLAINTIFFS' ARGUMENT

Plaintiffs argue for a result contrary to the one I have reached. Even though plaintiffs' theory has been mentioned, it seems appropriate to confront it directly at this juncture. The gist of plaintiffs' contention is that Scotia was the operator of the mine at Oven Fork, Kentucky and had the obligation to comply with all mine safety requirements lawfully imposed. Where Scotia did not discharge the mine safety functions but Blue Diamond did undertake to comply with them, the conclusion argued for is that

thereby Blue Diamond became a subcontractor of Scotia. In *United Engineers And Constructors, Inc.* v. *Branham,* Ky., 550 S. W. 2d 540 (1977), the Kentucky court instructs that "substance prevails over form, and that the main dispositive criterion is whether it is understood that the alleged principal or master has the right to control the details of the work." *Id.* at 543 . In the *Elkhorn-Hazard* decision the court held the Act did not apply precisely because the record did not show that it was the business of the land company to engage in coal mining. A person to be deemed a contractor must contract out some regular part of its business operations which normally would have been performed by its own employees. Examination of the uncontroverted proof convinces me that it was never a part of the regular business of Scotia to be basically responsible for the discharge of mine safety functions as between Blue Diamond, Scotia and its employees.[2] Scotia cannot contract out that which it does not control.[3] To reach the result desired by plaintiffs I would have to ignore the uncontroverted realities of the situation shown by the evidence under applicable and binding legal standards. This I decline to do.

A separate formal summary judgment in defendant's favor and against the plaintiffs will be entered forthwith.

This the 21st day of September, 1977.

(s) H. David Hermansdorfer, Judge

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[2]The evidence shows that Blue Diamond requested the MESA air ventilation studies relied on by plaintiffs in the tort action. [Testimony, Rick Keen, former MESA engineer.] Blue Diamond determined when and how to implement such recommendations and, admittedly, Scotia could not have rejected its parent's decision. [Testimony, Jasper Cornett.]

[3]The fact that Scotia never had independent corporate management vis-a-vis Blue Diamond is evidenced by the admitted fact that Scotia executive personnel are not compensated by Scotia directly, but are paid by Blue Diamond which in turn charges back to Scotia and other closely held companies proportionate costs of the overall management expense. [Affidavit, Harmond [sic] McCarter, Record Vol. III, Item 38; Exhibit A to Affidavit of Attorney Gerald M. Stern.]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 77-69

JENNIFER BOGGS, Individually and as Administratrix of the Estate of Dennis Clay Boggs, Et Al. - - - - - - - - - *Plaintiffs*

v.

BLUE DIAMOND COAL COMPANY - - - *Defendant*

ORDER—Filed September 21, 1977

In conformity with the Memorandum Opinion filed herein this date and upon consideration of all matters filed in support of and in opposition to defendant's motion for summary judgment, Rule 56, F.R.C.P., and considering plaintiffs' evidence in chief, and the Court being sufficiently advised,

The Court finds that there is no issue of material fact remaining as to the motion for summary judgment and the parties have asserted no such issue. The uncontroverted facts establish that the defendant meets each and every requirement of KRS 342.610(2) and, accordingly, is entitled to the limitations provided in KRS 342.690 making workmen's compensation the exclusive remedy of the plaintiffs in this action.

IT IS, THEREFORE, ORDERED AND ADJUDGED that defendant's motion for summary judgment be, and the same hereby is, SUSTAINED.

Order

IT IS FURTHER ORDERED that the complaint herein be, and the same hereby is, DISMISSED with prejudice.

IT IS FURTHER ORDERED that the Clerk shall strike this action from the docket of this Court.

This the 21st day of September, 1977.

(s) H. David Hermansdorfer, Judge